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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Virginia Code § 18.2-152.3:1(A) prohibits an individual from falsifying his identity to circumvent e-mail security measures and send unsolicited bulk e-mail. Although the statute is constitutional as applied to commercial e-mail spam, the Supreme Court of Virginia found that it was unconstitutional as applied to hypothetical political and religious e-mail spam. Without comparing the constitutional applications to the unconstitutional applications, Virginia's highest court declared that the statute was substantially overbroad and, thus, facially unconstitutional. The question presented is:

> When confronted with a claim that a statute is substantially overbroad and, thus, facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications?

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Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

INTRODUCTION

Unsolicited bulk e-mail messages ("e-mail spam") are a highly profitable but very costly nuisance for both internet service providers and their customers. By bombarding internet service providers with millions of messages peddling all manner of products and schemes, many of them fraudulent, spammers force businesses into expensive countermeasures. In response, Congress and many state legislatures have enacted prohibitions on e-mail spam. The Supreme Court of Virginia invalidated on its face, as substantially overbroad, an anti-spam law because it believed that some imagined spammer might be prosecuted for sending political or religious spam. The court never determined whether political or religious spam is sent with any degree of frequency relative to the tsunami of commercial spam, or even whether religious or political spam is sent at all. In other words, the court invalidated a statute on its face based on a hypothetical application that occurs very infrequently, if it occurs at all.

The Virginia Supreme Court's holding is flatly contrary to this Court's overbreadth jurisprudence,

which requires an assessment of a statute's actual overbreadth, which is then compared with its legitimate applications. The Supreme Court of Virginia's misapplication of substantial overbreadth was not an isolated one. Other courts have similarly misunderstood the substantial overbreadth inquiry. Moreover, given the costs associated with overbreadth challenges, it is vital that the lower courts apply a comparative rather than an absolutist assessment.

OPINIONS BELOW

The decision of the Supreme Court of Virginia on rehearing is published as *Jaynes v. Virginia*, 666 S.E.2d 303 (Va. 2008), and reprinted in the Appendix at 1. The initial decision of the Supreme Court of Virginia is published as *Jaynes v. Virginia*, 657 S.E.2d 478 (Va. 2008), and is reprinted in the Appendix at 30. Finally, the decision of the Court of Appeals of Virginia is published as *Jaynes v. Virginia*, 634 S.E.2d 357 (Va. Ct. App. 2006), and may be found in the Appendix at 84.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on September 12, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The First Amendment, incorporated against the States through the Due Process Clause of the Fourteenth Amendment, provides:

   > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. *Virginia Code* § 18.2-152.3:1(A) provides, in relevant part, that any person is guilty of a crime if he:

   > Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

The Act elevates the crime to a felony if "[t]he volume of unsolicited bulk e-mail (UBE) transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted

recipients in any one-year time period." *Virginia Code* § 18.2-152.3:1(B)(1).

STATEMENT OF THE CASE

1. Unsolicited bulk e-mail ("e-mail spam") is a significant problem. Congress has found that e-mail spam imposes significant financial costs and technological burdens on internet service providers and their customers. 15 U.S.C. §§ 7701(a)(3)-(4), (a)(6). The Senate Report accompanying those findings noted that Americans have become "deluged" by unwanted spam messages "that increasingly contain fraudulent and other objectionable content," sent by those "who seek to defraud consumers and make a living by preying on unsuspecting e-mail users." S. Rep. No. 108-102, at 2 (2003) (Report of the Committee on Commerce, Science and Transportation on the Can-Spam Act of 2003). Just five years ago, spam comprised ten percent of e-mail traffic and represented merely an annoyance to its recipients. Today, e-mail spam comprises almost eighty percent of all e-mail traffic and imposes significant burdens. *Id.* In 2003, Congress estimated that more than two trillion spam messages are sent each year and the worldwide cost of spam to businesses will surpass $113 billion by 2007. *Id.* at 3, 7. The report noted that, in particular, the use of fraudulent transmission information leaves recipients "with no effective ability" to manage their mailboxes and "is threatening to overwhelm . . . the network systems

of ISPs, business, universities, and other organizations." *Id.* at 3. At present, a majority of all e-mail messages received by internet service providers are considered spam. *App.* 102.

The individual computers linked through the Internet communicate using Internet Protocol (IP) addresses comprised wholly of numbers. Because numbers are difficult to remember, most IP addresses have a pseudonym—called a "domain name" consisting of words. For example, the domain name for the computers used by the Clerk of this Court is "supremecourtus.gov." The Domain Name System is composed of software and computers that translate domain names into their matching IP address and vice versa. *App.* 87.

When one sends an e-mail, the computers use Simple Mail Transfer Protocol (SMTP) to transmit the message. SMTP requires that the receiving computer perform a "HELO" verification of both sending IP address and the sending domain. Without the HELO information, the message is not delivered to the intended recipient. *App.* 87-88.

As part of their efforts to block spam, internet service providers utilize filters to examine the HELO information. If one particular domain or IP address is sending a large number of e-mail messages or if some of the HELO information is suspect, the internet service provider will classify messages as spam and will prevent the delivery of the e-mail messages. *App.* 88-89.

One can circumvent those security measures by falsifying one's identity. To explain, if one sent thousands of e-mails from the same computer and used the true IP address and true domain name, the spam filters easily would identify the e-mail messages as spam. However, if one used a wide variety of false IP addresses and false domain names to make it appear that the messages were coming from many different computers and many different domains, the spam filters would be less likely to block the messages. *App.* 89.

The Federal Trade Commission notes several other ways that spammers seek to circumvent the anti-spam security measures employed by internet service providers about the source of their messages. Some spammers use "spoofing" to falsify transmission information, while others use open relays or open proxies to effectively "launder" their messages and hide their tracks. Still others send viruses, worms, or "Trojan horses" to hijack infected computers and send spam from them. *See* Federal Trade Commission, NATIONAL DO NOT EMAIL REGISTRY: A REPORT TO CONGRESS (2004) (available at http://www.ftc.gov/reports/dneregistry/report.pdf.).

The profits from these operations are substantial. The Washington Post reports that one spam operation netted on average between $7,000 and $9,000 a day. Brian Krebs, *How Can So Much Spam Come from One Place?* Wash. Post, Nov. 19, 2008. To secure this profit, however, required sending a prodigious

amount of spam e-mails: only one in every 12 million spam e-mails turned into a sale. *Id.*

2. Virginia's Transmission of Unsolicited Bulk Electronic Mail (spam) Act, *Virginia Code* § 18.2-152.3:1(A), prohibits individuals from falsifying their identities in order to send e-mail spam. Under the statute, both the internet service provider and its subscribers are victims. Like the federal statute, 15 U.S.C. §§ 7701-7713 and the criminal statutes of many other States, the Virginia Act applies only when the sender falsifies his identity.[1] Unlike the federal statute, which prohibits only spam that involves commercial speech, the Virginia Act applies to all spam, regardless of its content.[2]

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[1] *See, e.g., Connecticut Gen. Stat.* § 53-451(a); *Delaware Code* tit. 11, §§ 937, 939; *Georgia Code Ann.* §§ 16-9-101, 102; *Iowa Code* § 716A.2; *Louisiana Rev. Stat. Ann.* § 14:73.6; *Michigan Comp. Laws* § 445.2507; *Nevada Rev. Stat.* § 205.492(2); *Ohio Rev. Code Ann.* § 2913.421; 18 *Pennsylvania Cons. Stat. Ann.* § 7661.

[2] Many States follow the federal model and only prohibit spam that involves commercial speech. *See, e.g., California Bus. & Prof. Code* § 17529.5; *Delaware Code* tit. 11, §§ 937, 939; *Georgia Code Ann.* §§ 16-9-101, 102; *Michigan Comp. Laws* § 445.2507; *Ohio Rev. Code Ann.* § 2913.421. Ten other States have statutes that apply to *all* spam regardless of content. *See Connecticut Gen. Stat.* § 53-451(b)(7); *Illinois Comp. Stat.* § 5/16 D-3(a)(5); *Idaho Code Ann.* § 48-603E; *Iowa Code* § 716A.2; *Louisiana Rev. Stat. Ann.* § 14:73.6; *Nevada Rev. Stat.* § 205.492(2); *Oklahoma Stat.* tit. 15, § 776.1(A); 18 *Pennsylvania Cons. Stat. Ann.* § 7661; *Tennessee Code Ann.* § 39-14-603; *West Virginia Code* § 46A-6G-2.

The respondent, Jeremy Jaynes, violated the Virginia Act by falsifying his identity and sending exclusively *commercial* e-mail spam. *App.* 4, 10, 32. While acknowledging that the Act is constitutional as applied to him, Jaynes asserts that it is unconstitutional as applied to someone who falsifies his identity to send e-mail spam that involves political or religious speech. *App.* 10, 24. He further contends that these unconstitutional applications are sufficient to render the statute substantially overbroad and, thus, facially unconstitutional. *App.* 10.

3. The facts surrounding Jaynes' crime are not in dispute. Jaynes falsified his identity to circumvent America On-Line's (AOL) spam filters and send spam to individuals who maintain e-mail addresses with AOL.[3] *App.* 2. Specifically, the domains in the "from" lines of the e-mails that Jaynes sent through AOL servers were registered by Network Solutions. In order to register a domain, the registrant must enter a contract/agreement and provide information to the registrar. The information required for registration includes name and contact information and it must be truthful and accurate. In this case, all of the

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[3] At the time of Jaynes' actions, AOL's mail servers alone received approximately one *billion* spam e-mails every day, and spam comprises at least seventy to eighty percent of the e-mail traffic. Despite AOL's best efforts to block spam, AOL's subscribers generated seven to ten million complaints per day. *App.* 102.

contact information given to Network Solutions was false. *App.* 91.

According to AOL's database, Jaynes was responsible for 12,197 e-mails on July 16, 2003, 24,172 e-mails on July 19, 2003, and 19,104 e-mails on July 26, 2003. *App.* 2. Jaynes' e-mails offered three products: (1) a product to purportedly make money by processing FedEx refund claims; (2) a "Penny Stock Picker"; and (3) a "History Eraser" product. *App.* 4. All of these e-mails originated from IP addresses and domains that ultimately traced back to Jeremy Jaynes. *App.* 2. Furthermore, Jaynes was in possession of AOL's stolen database containing 107 million e-mail addresses of its customers. *App.* 3-4, 33. Because Jaynes sent more than 10,000 e-mails in a single day, the felony provisions of the Virginia Act apply.

Jaynes was indicted by a grand jury of the Circuit Court of Loudoun County. Jaynes moved to dismiss his indictment on a variety of constitutional grounds including lack of jurisdiction, vagueness, a violation of the Dormant Commerce Clause, and a violation of the First Amendment. *App.* 4. The trial court rejected all of these arguments. Following an eight-day trial, a jury convicted Jaynes of violating the felony provisions of the Act. The jury then recommended that Jaynes serve nine years in prison. The trial judge agreed with this recommendation. *App.* 4-5.

4. On appeal, Virginia's intermediate appellate court unanimously affirmed. *App.* 84-120. The Court of Appeals of Virginia rejected the contention that the Virginia Act is unconstitutionally overbroad because it prevents the sending of anonymous e-mails. *App.* 99-100. Specifically, the court found that "the statute does not prevent anonymous speech, as appellant argues, but prohibits trespassing on private computer networks through intentional misrepresentation, an activity that merits no First Amendment protection." *App.* 100. The court subsequently denied Jaynes' request for *en banc* review.

5. The Supreme Court of Virginia granted discretionary review on all issues and also granted Virginia's petition for a cross-appeal on the issue of whether, as a matter of state law, Jaynes could bring a facial challenge alleging overbreadth.

Virginia's highest court unanimously rejected Jaynes' jurisdictional, vagueness, and Dormant Commerce Clause arguments. *App.* 36-39, 55-63, 63. Relying on *Virginia v. Hicks*, 539 U.S. 113, 120 (2003), the court found that (1) the issue of standing to bring an overbreadth claim was an issue of state law, *App.* 43-45; and (2) as a matter of state law, Jaynes could not bring an overbreadth claim. *App.* 45-55.

6. Jaynes sought rehearing on the sole issue of whether he could bring an overbreadth challenge. Virginia's highest court granted rehearing and concluded that, as a matter of federal constitutional

law, the court must entertain such a challenge.[4] *App.* 10-18. Turning to the merits of Jaynes' overbreadth claim, it found the Virginia Act unconstitutional as applied to one who falsifies his identity to send political or religious e-mail spam. *App.* 21-25.

Having determined that the statute is unconstitutional in some instances, Virginia's highest court then focused on whether the Virginia Act is substantially overbroad. In making this determination, the court did not compare the statute's legitimate sweep (the constitutional applications) to the purported overbreadth (the unconstitutional applications). Instead, the court focused exclusively on the *nature* of the purported overbreadth. As the court explained, the Virginia Act:

> would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech. For example, were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute. Such an expansive scope of unconstitutional coverage is not what the Court in *Williams* referenced "as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." We thus reject the Commonwealth's argument that Jaynes' facial challenge to [the Virginia Act] must

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[4] While Virginia disputed this point in the Supreme Court of Virginia, it does not contest the issue in this Court.

> fail because the statute is not "substantially overbroad."

App. 26-27 (citations omitted). Because the court found substantial overbreadth, the court declared the Virginia Act to be facially unconstitutional under the First Amendment.[5] *App.* 28-29.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons. First, the Virginia Supreme Court's decision directly conflicts with this Court's decisions setting forth the test for determining substantial overbreadth. Instead of engaging in an analysis of comparing the constitutional applications (legitimate sweep) to the

[5] The Supreme Court of Virginia's determination of substantial overbreadth turned entirely on its understanding of this Court's overbreadth doctrine interpreting the United States Constitution. "Because it is the Commonwealth of Virginia, not [Jaynes], that has invoked the authority of the federal courts by petitioning for a writ of certiorari, [this Court's] jurisdiction to review the First Amendment merits question is clear." *Hicks*, 539 U.S. at 120.

This is the third time in less than ten years that the Virginia Supreme Court has invalidated a statute or policy as facially overbroad under the First Amendment. The first two occasions were reversed by this Court. *See Virginia v. Hicks*, 563 S.E.2d 674 (Va. 2002) (invalidating trespass policy by public housing authority because of First Amendment overbreadth), *rev'd* 539 U.S. at 124; *Black v. Virginia*, 553 S.E.2d 738 (Va. 2001) (invalidating cross-burning statute), *rev'd Virginia v. Black*, 538 U.S. 343 (2003).

unconstitutional applications, the court below engaged in an absolutist analysis that assessed whether the statute reached constitutionally protected expression. The Supreme Court of Virginia did not examine whether the First Amendment problem it identified actually occurs at all or whether it occurs with any frequency. Had the court adhered to this Court's precedent, it would necessarily have rejected Jaynes' overbreadth claim. Jaynes conceded, and the Virginia Supreme Court did not question, that the statute is constitutional as applied to commercial speech. It is difficult to imagine a case where application of the overbreadth doctrine is *less* warranted.

Second, the Virginia Supreme Court's decision deepens an existing conflict among the lower appellate courts. The First, Third, and Tenth Circuits adhere to this Court's requirement that courts follow a comparative approach to the overbreadth analysis—comparing the constitutional applications to the unconstitutional applications in light of the government's interest. In contrast, the Virginia Supreme Court, the Eighth Circuit, and the Hawaii Supreme Court, along with other courts, have disregarded this Court's direction and have instead employed an absolutist approach that examines whether the statute conceivably chills protected speech and expression.

Third, it is vitally important that the lower courts apply the correct test for determining substantial overbreadth. The comparative test

utilized by this Court ensures the overbreadth doctrine is limited. The absolutist test utilized by the Virginia Supreme Court casts doubt on every statute that regulates expression.

I. THE VIRGINIA SUPREME COURT'S DECISION CONTRADICTS THIS COURT'S TEST FOR DETERMINING SUBSTANTIAL OVERBREADTH.

A. This Court's Precedents Require that, Before a Court Strikes Down a Statute on Its Face Under the Overbreadth Doctrine, the Court Must Compare the Statute's Constitutional and Unconstitutional Applications.

Unlike an as-applied challenge where the litigant simply asks that a law be declared unconstitutional in the circumstances presently before the court, *County Court of Ulster County v. Allen,* 442 U.S. 140, 154-55 (1979), a facial challenge asks that the law be declared "invalid *in toto*" and, thus, "incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). While this "Court has expressed increasing skepticism of facial challenges in recent years," *Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (*en banc*), it continues to entertain facial challenges in two contexts. First, a litigant may bring a typical facial challenge alleging "that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745

(1987), or that the statute lacks "a plainly legitimate sweep." *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (Stevens, J., joined by Roberts, C.J., & Kennedy, J., announcing the judgment of the Court). Second, in some limited contexts, litigants may bring a facial challenge alleging overbreadth. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004). In a facial challenge alleging overbreadth, the law is invalidated in *all* applications "because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party,* 128 S. Ct. 1184, 1190 n.6 (2008) (citation omitted).

Because "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct," *Hicks*, 539 U.S. at 119, it is "strong medicine that is used sparingly and only as a last resort." *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 14 (1988) (citation and internal quotations omitted). Facial challenges often "rest on speculation," "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with

the Constitution." *Washington State Grange*, 128 S. Ct. at 1191 (internal quotation marks omitted). "It is neither [the courts'] obligation nor within [their] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

These concerns have led this Court to place significant restrictions on the application of the overbreadth doctrine. Because "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects," *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008), the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge," *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The requirement of substantial overbreadth avoids invalidation of a statute "where, despite some possibility of impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65 (1984) (citation omitted). "The overbreadth claimant bears

the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (brackets original, citation omitted).

Ultimately, the substantial overbreadth inquiry is a comparative analysis—an assessment of both the constitutional applications and the unconstitutional applications. This comparison must consider "whether there is an appropriate balance of the affected speech and the governmental interests that the [statute] purports to serve." *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150, 165 (2002). Even if a statute has unconstitutional applications, "that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 207 (2003) (internal quotation marks and citation omitted). There must be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Taxpayers for Vincent,* 466 U.S. at 801. Quite simply, if "the vast majority of its applications" raise "no constitutional problems whatever," the statute cannot be substantially overbroad. *Williams,* 128 S. Ct. at 1844.

B. The Virginia Supreme Court Struck Down the Anti-Spam Statute on Its Face Without Comparing Its Constitutional Applications to the Unconstitutional Applications.

In direct conflict with this Court's holdings, the Virginia Supreme Court failed to determine whether the Virginia Act's "application to protected speech is substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *McConnell*, 540 U.S. at 207. Had it done so, it could not possibly have struck down the statute on its face, for no one disputed that "the vast majority of its applications" raise "no constitutional problems whatever." *Williams*, 128 S. Ct. at 1844.

First, the broad legitimate sweep of the Act is clear. The Supreme Court of Virginia accepted that the Virginia Act is constitutional as applied to *all commercial* e-mail spam. *See App.* 5, 24, 40-41.[6] To be

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[6] The correctness of that conclusion is not before this Court. As noted, Jaynes has conceded from the outset of this case that the statute is constitutional as applied to commercial spam; and the Virginia Supreme Court struck down the statute on its face notwithstanding its recognition that commercial spam can be proscribed. The issue presented to this Court is the Virginia Supreme Court's deeply flawed application of the overbreadth doctrine, not its underlying rulings regarding what types of spam the State may, and may not, prohibit.

The Virginia Supreme Court's conclusion that the State can block commercial e-mail spam accords with the holdings of almost all the lower courts that have addressed the issue. *See White Buffalo Ventures, LLC v. University of Texas*, 420 F.3d 366,

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sure, the Virginia Act is not limited to commercial e-mail spam, but this is not "a constitutional defect. The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Hill v. Colorado*, 530 U.S. 703, 730-31 (2000).

Second, the purported overbreadth is limited. The only purported unconstitutional application identified by the Virginia Supreme Court is when someone falsifies his identity and sends political or religious e-mail spam. *App.* 21-25. Yet, the court below did not attempt to quantify how–if ever–often this purported unconstitutional application occurs. Although Jaynes has the "heavy burden," *McConnell,*

374-78 (5th Cir. 2005) (upholding state university's exclusion of commercial e-mail spam); *Verizon Online Servs. v. Ralsky*, 203 F. Supp. 2d 601, 617 (E.D. Va. 2002) ("the sending of spam to and through an ISP's e-mail servers constitutes the tort of trespass to chattel in the state of Virginia."); *United States v. Gray*, 78 F. Supp. 2d 524, 532 (E.D. Va. 1999) ("[u]nauthorized access into a . . . computer is analogous to breaking and entering in the physical world."); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451-52 (E.D. Va. 1998) (granting summary judgment to ISP on theory that transmission of bulk e-mail constitutes trespass to chattels); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (sending unauthorized spam constitutes trespass to chattels); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (granting preliminary injunction and holding that electronic signals sent over computer network are sufficiently tangible to support a trespass claim). *But see Intel Corp. v. Hamidi*, 71 P.3d 296, 302-12 (Cal. 2003) (refusing to allow owner of computer network to block e-mail spam sent by former employee).

540 U.S. at 207, "of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists," *Hicks*, 539 U.S. at 122 (brackets original, citation omitted), he failed to produce any evidence that persons actually falsify their identity to send political and religious e-mail spam. Because of "the tendency of [the] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals," *Williams*, 128 S. Ct. at 1843, overbreadth analysis requires "realistic" threats to protected speech, not imagined ones. *Taxpayers for Vincent,* 466 U.S. at 801. Assuming the Virginia Supreme Court is correct in its description of the purported overbreadth, the Virginia Act is constitutional in the vast majority of actual applications.[7] *Cf. New York v. Ferber*, 458 U.S. 747,

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[7] Although Virginia does not agree with the Virginia Supreme Court that the Virginia Act is unconstitutional as applied to *all* spam containing religious and political speech, the Court need not reach that issue to address the Virginia Supreme Court's deeply flawed overbreadth holding.

In the State's view, the Virginia Act is constitutional as applied to all e-mail spam—including religious and political spam—sent to internet service providers or recipients who seek to exclude it by using anti-spam security measures. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). This principle extends to door-to-door solicitation, *Martin v. City of Struthers*, 319 U.S. 141, 147-48 (1943); regular mail, *Rowan*, 397 U.S. at 736-37, radio waves; *Federal Commc'n Comm'n v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978); and other forms of amplified sound, *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). An aspect of the broader "right to be let alone," *Olmstead v. United States*, 277

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772 (1982) ("a single impermissible application" is insufficient to deem a statute or policy invalid).

Neither Jaynes nor the Virginia Supreme Court disagreed that the Virginia Act's "plainly legitimate applications" vastly outnumber its "application[s] to protected speech." Nevertheless, in direct conflict with this Court's precedents, the Virginia Supreme Court failed to undertake that inquiry. Although the court mouthed the test, *App.* 26, it never actually engaged in the comparison. Instead, the court held that the statute's unconstitutional applications are "substantial" because "were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute." *App.* 26-27. But this Court's overbreadth doctrine does not look to the inherent value of the protected speech. Rather, it requires courts to make a realistic comparison

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U.S. 438, 478 (1928) (Brandeis, J., dissenting), the right to avoid unwelcome speech applies in the home, *Rowan*, 397 U.S. at 738, its immediate surroundings, *Frisby v. Schultz*, 487 U.S. 474, 487 (1988), and in transit to one's employment, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921). The person who sends e-mail spam to recipients who do not wish to receive it is indistinguishable from the picketer who stays in front of a particular house, *Frisby*, 487 U.S. at 487, the firm that continues to send junk mail, *Rowan*, 397 U.S. at 736-37, or the salesperson who refuses to leave. *Martin*, 319 U.S. at 147-48. As noted, the Court need not reach this question because the statute's unconstitutional applications are plainly not "substantial" even if the Virginia Supreme Court is correct that the State may not proscribe *any* political and religious spam.

between permissible applications and those applications that would be constitutionally impermissible. A statute that is constitutionally applied to hundreds of thousands, or even millions, of instances of commercial speech and only a handful of instances of political speech is not overbroad under the First Amendment.

To the extent there are realistic circumstances where the Virginia Act is unconstitutional, any such application may be avoided through case-by-case litigation. *Hicks*, 539 U.S. at 124. "As-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales*, 127 S. Ct. at 1639. Because the statute is constitutional as applied to Jaynes, a fact he does not dispute, *App.* 5, 24, 40-41, there is no need for the draconian remedy of declaring the Virginia Act invalid in all applications. When confronted with a statute that is unconstitutional in some applications, courts should "try not to nullify more of a legislature's work than is necessary, [because] '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006).

In sum, the reasoning of the Virginia Supreme Court directly contradicts this Court's decisions concerning substantial overbreadth. At worst, the Virginia Act is constitutionally problematic in a hypothetical case when someone falsifies his identity to send political or religious e-mail spam. "In determining whether a law is facially invalid, we

must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 128 S. Ct. at 1190. On this record, there is no evidence that such a situation ever occurs. Indeed, given the sharp conflict of the decision below with this Court's overbreadth jurisprudence, this Court may wish to consider summary reversal.

II. THE VIRGINIA SUPREME COURT'S DECISION DEEPENS A CONFLICT AMONG THE COURTS CONCERNING HOW TO DETERMINE SUBSTANTIAL OVERBREADTH.

Because this "Court has not addressed precisely the factors relevant to a determination whether a statute is substantially overbroad," *Aiello v. City of Wilmington*, 623 F.2d 845, 854 (3rd Cir. 1980), the lower appellate courts are divided as to how to determine if a statute is substantially overbroad. The Supreme Court of Virginia's decision only deepens the conflict.

Some courts properly determine substantial overbreadth by making a comparative assessment—measuring the constitutional applications against the unconstitutional applications in light of the government's interest. For example, the Third Circuit examines "(1) the number of valid applications, (2) the historic or likely frequency of conceivably impermissible applications, (3) the nature of the

activity or conduct sought to be regulated, and (4) the nature of the state interest underlying the regulation." *Borden v. Sch. Dist. of Tp. of East Brunswick*, 523 F.3d 153, 165 (3rd Cir. 2008) (internal quotation marks and citation omitted).[8] Similarly, the First Circuit's approach involves "a rough balancing of the number of valid applications compared to the number of potentially invalid applications. Some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable." *Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977).

The Tenth Circuit focuses on whether "the number of [unconstitutional] applications is insubstantial compared to the number of [constitutional] applications," *ACORN v. City of Tulsa*, 835 F.2d 735, 744 (10th Cir. 1987), and rejects overbreadth claims if the challenger fails "to show in this case that more than a small percentage of conceivable applications will raise serious [constitutional] questions." *Nat'l Advertising Co. v. City and County of Denver*, 912 F.2d 405, 411 (10th Cir. 1990).

In sharp contrast, other courts—such as the Supreme Court of Virginia—apply an absolutist

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[8] *Borden* simply is a reaffirmation of the four factors adopted by the Third Circuit in *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 226 (3rd Cir. 2004), and originally enunciated by Judge Sloviter. *See Aiello*, 623 F.2d at 860 (Sloviter, J., concurring and dissenting).

assessment under which the law is facially invalid "if the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 541 F.3d 785, 792 n.7 (8th Cir. 2008) (quoting *Taxpayers for Vincent,* 466 U.S. at 788-89), *pet. for rehearing en banc denied* (8th Cir. Dec. 5, 2008). The Supreme Court of Virginia invalidated the Virginia Act because the Act might prevent someone from sending e-mail spam containing *The Federalist*. *App.* 26-27. The Eighth Circuit applied a similar analysis in *Milavetz*. The court of appeals struck down on its face a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that prohibited debt relief agencies from advising a person "to incur more debt in contemplation of such person" filing a bankruptcy action. 11 U.S.C. § 526(a)(4). The court concluded that the provision violates the First Amendment because there are "situations where it would likely be in the assisted person's . . . best interest . . . to incur additional debt in contemplation of bankruptcy." *Milavetz*, 541 F.3d at 793. The court did not compare the comparative frequency of that situation with the provision's constitutional applications (*e.g.*, when the advice is given "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge"). *Id.* Instead, the court found substantial overbreadth because the statute was not written "to prevent only that speech which the government has an interest in restricting." *Id.* at 794. *See also id.* at 799 (Colloton,

J., dissenting) (criticizing the majority because, "[e]ven under Milavetz's broad construction of the statute, a facial challenge resting on a few hypothetical situations . . . is unlikely to justify invalidating a statute in *all* of its applications") (internal quotation marks and citations omitted).

Likewise, the Supreme Court of Hawaii finds substantial overbreadth if the statute "conceivably may" include activities protected by the First Amendment. *Hawaii v. Beltran,* 172 P.3d 458, 464 (Haw. 2007). And the Iowa Supreme Court found that a juvenile curfew ordinance was substantially overbroad based upon hypothetical juveniles who might attend late prayer vigils or labor union meetings lasting past 11:00 p.m. *City of Maquoketa v. Russell,* 484 N.W.2d 179, 185-86 (Iowa 1992). The court did not engage in a quantitative assessment of the legitimate sweep of the ordinance with its problematic applications. *Id.* These highly unrealistic and infrequent hypotheticals were sufficient to invalidate the ordinance on its face. *See also Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 194-95 (W.D.N.Y. 2005) (invalidating as substantially overbroad a portion of a statute regulating gun sales without any comparison of its legitimate sweep with its impermissible applications); *Idaho v. Casey*, 876 P.2d 138, 141-42 (Idaho 1994) (Silak, J., dissenting from facial invalidation of interference with hunting statute, reasoning that the petitioner had failed to show that "the overbreadth of this statute is substantial in light of the number of valid

applications compared to the number of potentially invalid applications."); *Florida v. Montas*, ___ So. 2d ___, ___, 2008 WL 4753740 at * 2 (Fla. Dist. Ct. App. 2008) (invalidating statute regulating the wearing of a military uniform because the court could "conceive of situations when a person might wear some part of a military uniform to communicate a message. For instance, a person might do so to express his support of the troops or to protest military action.").

Under this absolutist approach, there is only one consideration—does the statute conceivably reach constitutionally protected speech or expression? There is no comparison between the actual constitutional and unconstitutional applications. A statute that is constitutional in ninety-nine percent of its applications may be invalidated as substantially overbroad. Just last Term, in *United States v. Williams*, this Court reaffirmed that "a statute's overbreadth [must] be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." 128 S. Ct. at 1838. Nonetheless, the lower courts remain divided over application of the doctrine, as some of them refuse to abide by this Court's mandate that courts compare constitutional applications with unconstitutional applications.

III. IT IS VITALLY IMPORTANT THAT THE LOWER APPELLATE COURTS APPLY THE PROPER TEST FOR DETERMINING SUBSTANTIAL OVERBREADTH.

While "judicial power includes the duty 'to say what the law is,'" *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006), the judiciary must not "frustrate the expressed will of Congress or that of the state legislatures." *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953). The comparative approach—comparing constitutional applications to unconstitutional applications—strikes the proper balance.

In contrast, the absolutist approach—focusing only on the purported unconstitutional applications—threatens to undermine the democratic process and expand the role of the judiciary. Under the absolutist approach, the validity of numerous statutes is in serious doubt. Most obviously, those state statutes that prohibit civilly or criminally all e-mail spam rather than simply commercial e-mail spam now are needlessly suspect.[9] Less obviously, because it is conceivable that there might be unconstitutional applications, the federal statute and those state statutes that criminalize commercial spam are at

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[9] *See Connecticut Gen. Stat.* § 53-451(b)(7); *Illinois Comp. Stat.* § 5/16 D-3(a)(5); *Idaho Code Ann.* § 48-603E; *Iowa Code* § 716A.2; *Louisiana Rev. Stat. Ann.* § 14:73.6; *Nevada Rev. Stat.* § 205.492(2); *Oklahoma Stat.* tit. 15, § 776.1(A); 18 *Pennsylvania Cons. Stat. Ann.* § 7661; *Tennessee Code Ann.* § 39-14-603; *West Virginia Code* § 46A-6G-2.

risk.[10] Moreover, as *Milavetz, Beltran,* and *Montas* demonstrate, the ramifications of the absolutist approach are not limited to cyberspace. Quite simply, any regulation of speech or expression theoretically can chill constitutionally protected speech in some unrealistic hypothetical circumstance, and therefore is constitutionally suspect.

Since the overbreadth doctrine is strong medicine, its dosage must be limited. This Petition presents the ideal case to determine the correct dosage. There is no dispute that Jaynes violated the Virginia Act or that the Virginia Act is constitutional as applied to Jaynes. *App.* 40-41. While Jaynes raised a variety of other constitutional arguments, none of them are at issue. *App.* 5-9, 36-39, 55-62, 63. There are no alternative grounds to affirm the judgment. The decision of the Supreme Court of Virginia turned exclusively on its analysis of the United States Constitution and facial overbreadth.

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[10] *See, e.g.,* 15 U.S.C. §§ 7701-7713; *California Bus. & Prof. Code* § 17529.5; *Delaware Code* tit. 11, §§ 937, 939; *Georgia Code Ann.* §§ 16-9-101, 102; *Michigan Comp. Laws* § 445.2507; *Ohio Rev. Code Ann.* § 2913.421.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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December 11, 2008

APPENDIX

OPINION OF THE SUPREME COURT OF VIRGINIA

Present: Hassell, C.J., Koontz, Kinser, Lemons, Agee,[1] and Goodwyn, JJ., and Lacy, S.J.

JEREMY JAYNES

v. Record No. 062388

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE G. STEVEN AGEE
September 12, 2008[2]

FROM THE COURT OF APPEALS OF VIRGINIA
Upon rehearing pursuant to orders dated April 28, 2008 and May 19, 2008

Jeremy Jaynes appeals from the judgment of the Court of Appeals which affirmed his convictions in the Circuit Court of Loudoun County for violations of Code § 18.2-152.3:1, the unsolicited bulk electronic mail (e-mail) provision of the Virginia Computer Crimes Act, Code §§ 18.2-152.1 through -152.15. For the reasons set forth below, we will reverse the judgment of the Court of Appeals.

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[1] Justice Agee participated in the hearing and decision of this case prior to his retirement from the Court on June 30, 2008.

[2] The prior opinion rendered February 29, 2008, reported at 275 Va. 341, 657 S.E.2d 478 (2008), was withdrawn by the Court after a petition for rehearing was granted by Orders dated April 28, 2008 and May 19, 2008.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

From his home in Raleigh, North Carolina, Jaynes used several computers, routers and servers to send over 10,000 e-mails within a 24-hour period to subscribers of America Online, Inc. (AOL) on each of three separate occasions. On July 16, 2003, Jaynes sent 12,197 pieces of unsolicited e-mail with falsified routing and transmission information onto AOL's proprietary network. On July 19, 2003, he sent 24,172, and on July 26, 2003, he sent 19,104. None of the recipients of the e-mails had requested any communication from Jaynes. He intentionally falsified the header information and sender domain names before transmitting the e-mails to the recipients.[3] However, investigators used a sophisticated database search to identify Jaynes as the sender of the e-mails.[4] Jaynes was arrested and charged with violating Code § 18.2-152.3:1, which provides in relevant part:

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[3] Simple Mail Transfer Protocol (SMTP) is what an e-mail server uses to transmit an e-mail message, and the SMTP requires verification of the sender's IP address and domain. Evidence at trial demonstrated that Jaynes sent the e-mails with domain names which did not correspond to the domain names assigned to the sending IP addresses.

[4] Computers may be identified by their unique IP address number, which consists of blocks of numerals separated by periods.

A. Any person who:

1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers . . . is guilty of a Class 1 misdemeanor.

B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:

1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period. . . .

While executing a search of Jaynes' home, police discovered a cache of compact discs (CDs) containing over 176 million full e-mail addresses and 1.3 billion e-mail user names. The search also led to the confiscation of storage discs which contained AOL e-mail address information and other personal and private account information for millions of AOL subscribers. The AOL user information had been stolen from AOL by a former employee and was in Jaynes' possession. During trial, evidence demonstrated that Jaynes knew that all of the more than 50,000 recipients of his unsolicited e-mails

were subscribers to AOL, in part, because the e-mail addresses of all recipients ended in "@aol.com."[5]

An expert witness testified that the e-mails sent by Jaynes were not consistent with solicited bulk e-mail, but rather constituted unsolicited bulk e-mail (sometimes referred to as "spam" e-mail) because Jaynes had disguised the true sender and header information and used multiple addresses to send the e-mails. Other evidence at trial demonstrated that all of AOL's servers were located in Virginia, although some were located in Loudoun County and others were located in Prince William County.

Jaynes moved to dismiss the charges against him on the grounds that the statute violated the dormant Commerce Clause, was unconstitutionally vague, and violated the First Amendment. The circuit court denied that motion. Jaynes filed a separate motion to strike in which he challenged the jurisdiction of the circuit court. The court determined it had jurisdiction and denied the motion to strike.

A jury convicted Jaynes of three counts of violating Code § 18.2-152.3:1, and the circuit court sentenced Jaynes to three years in prison on each

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[5] Jaynes' e-mails advertised one of three products: (1) a FedEx refund claims product, (2) a "Penny Stock Picker," and (3) a "History Eraser" product. To purchase one of these products, potential buyers would click on a hyperlink within the e-mail, which redirected them outside the e-mail, where they could consummate the purchase.

count, with the sentences to run consecutively for an active term of imprisonment of nine years. The Court of Appeals affirmed his convictions, *Jaynes v. Commonwealth,* 48 Va. App. 673, 634 S.E.2d 357 (2006). We awarded Jaynes an appeal.

II. ANALYSIS

Jaynes makes four assignments of error to the judgment of the Court of Appeals. First, he assigns error to the determination that the circuit court had jurisdiction over him on the crimes charged. Second, Jaynes contends Code § 18.2-152.3:1 "abridge[s] the First Amendment right to anonymous speech," and it was error not to reverse his convictions on that basis. Separately, Jaynes assigns as error the failure of the Court of Appeals to hold that Code § 18.2-152.3:1 is void for vagueness. Lastly, Jaynes posits that the statute violates the Commerce Clause of the United States Constitution.

A. JURISDICTION

Jaynes asserts that the Court of Appeals erred in holding that the circuit court had jurisdiction over him for violating Code § 18.2-152.3:1 because he did not "use" a computer in Virginia. He contends that a violation of that statute can occur only in the location where the e-mail routing information is falsified. Jaynes maintains that because he only used computers to send the e-mails from his home in Raleigh, North Carolina, he committed no crime in

Virginia. Further, because he had no control over the routing of the e-mails, he argues his actions did not have an "immediate result" in Virginia, and under *Moreno v. Baskerville,* 249 Va. 16, 452 S.E.2d 653 (1995), could not be the basis for jurisdiction over him by Virginia courts. Therefore, according to Jaynes, the circuit court had no jurisdiction over him and his convictions are void.

To successfully prosecute a crime under Code § 18.2-152.3:1(B), the Commonwealth must establish all the elements of that crime. In addition to the element of the volume of transmissions within a specific time period, the Commonwealth must prove the sender used a computer and that such use was with the intent of falsifying routing information. The Commonwealth must also prove that the transmission of such false routing information occurred in connection with the use of an e-mail provider's computer network for that transmission. Thus, the crime is not complete until there is e-mail transmission passing through or into the computer network of the e-mail provider or subscriber containing the false routing information.

Jaynes argues that he "merely sent e-mails that happened to be routed through AOL servers." We disagree. As the evidence established, all e-mail must flow through the recipient's e-mail server in order to reach the intended recipient. By selecting AOL subscribers as his e-mail recipients, Jaynes knew and intended that his e-mails would utilize AOL servers because he clearly intended to send to users whose

e-mails ended in "@aol.com." The evidence established that the AOL servers are located in Virginia, and that the location of AOL's servers was information easily accessible to the general public. Applying our standard of review to the evidence presented along with all reasonable inferences therefrom, we conclude that the evidence supports the conclusion that Jaynes knew and intended that the e-mails he sent to AOL subscribers would utilize AOL's servers which are located in Virginia. Thus an intended and necessary result of Jaynes' action, the e-mail transmission through the computer network, occurred in Virginia.

Furthermore, a state may exercise jurisdiction over criminal acts that are committed outside the state, but are intended to, and do in fact, produce harm within the state. "'It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit.'" *Travelers Health Ass'n v. Commonwealth,* 188 Va. 877, 892, 51 S.E.2d 263, 269 (1949) (citing *Strassheim v. Daily,* 221 U.S. 280, 284-85 (1911)).

Jaynes, relying on *Moreno,* argues that this principle, referred to as the "immediate result doctrine," is not applicable if third parties intervene between the out-of-state conduct and the in-state harm. In *Moreno,* the defendant, while in Arizona, arranged for delivery of drugs to an accomplice in Arizona who, in turn, delivered the drugs to two other accomplices who ultimately sold the drugs in

Virginia. 249 Va. at 17-18, 452 S.E.2d at 654. Noting that drug distribution is not a continuing offense and that payment is not an element of the crime of drug distribution, *id.* at 18-20, 452 S.E.2d at 654-55, we concluded that the discrete crime of drug distribution was committed by the defendant while in Arizona and that the ultimate sale of the drugs in Virginia was not the "immediate result" of the distribution of drugs in Arizona because the subsequent distributions by Moreno's accomplices intervened. *Id.* at 19, 452 S.E.2d at 655.

Jaynes argues that an e-mail could be routed through a number of different mail handling networks before the e-mail reaches its destination, and that an e-mail sender cannot control the route used. Such routing, Jaynes contends, is the same type of intervention which occurred in *Moreno*. Therefore, according to Jaynes, the intervention of intermediate e-mail routers and servers prior to arrival of the e-mails at the AOL servers shows that the alleged harm through the AOL servers in Virginia was not the "immediate result" of Jaynes' actions in North Carolina.

Jaynes' reliance on *Moreno* fails because, as noted above, Jaynes' affirmative act of selecting AOL subscribers as recipients of his e-mails insured the use of AOL's computer network to deliver the e-mails and such use was the "immediate result" of Jaynes' action, regardless of any intermediate routes taken by the e-mails. Because the use of the computer network of an e-mail service provider or its subscribers is an

integral part of the crime charged and because the use of AOL's e-mail servers was the "immediate result" of Jaynes' acts, we hold that Jaynes was amenable to prosecution in Virginia for a violation of Code § 18.2-152.3:1. Accordingly, the circuit court had jurisdiction over Jaynes.

B. FIRST AMENDMENT OVERBREADTH

Jaynes next contends that Code § 18.2-152.3:1 is constitutionally deficient as overbroad under the First Amendment and therefore the statute cannot be enforced. He argues the Court of Appeals erred in affirming the circuit court's ruling denying his motion to dismiss on that basis.

The Court of Appeals assumed without deciding that Jaynes had standing to raise a First Amendment challenge, but concluded that Code § 18.2-152.3:1 was in the nature of a trespass statute, thereby eliminating the need to address the First Amendment issue. The Commonwealth, in addition to arguing that the Court of Appeals correctly construed the statute as a trespass statute, contends in an assignment of cross-error that Jaynes lacks standing to raise a First Amendment challenge to Code § 18.2-152.3:1 and therefore the First Amendment issues raised by Jaynes should not be considered. We will begin by addressing the issue of standing.

1. STANDING

Jaynes does not make a pure facial challenge to Code § 18.2-152.3:1 as he does not argue "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). Similarly, Jaynes does not make an "as-applied challenge" to the statute, meaning he does not contend the application of the statute to the actual acts for which he was convicted violates the First Amendment. *See Gonzales v. Carhart,* 550 U.S. ___, ___, 127 S.Ct. 1610, 1638-39 (2007) (comparing facial and as-applied challenges). Instead, Jaynes challenges the statute by claiming it is unconstitutional as overbroad. *See Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003) (*"Hicks II"*).[6] That is, Jaynes contends that because the statute could potentially reach the protected speech of a third party, he (Jaynes) is entitled to claim exoneration for his otherwise unprotected speech.[7]

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[6] Unlike a "facial" or "as-applied" challenge, an overbreadth challenge "suffices to invalidate all enforcement of that law" upon showing that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks II,* 539 U.S. at 118-19 (2003) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)).

[7] The Commonwealth also argues that Jaynes did not preserve this issue for appeal because he did not raise his overbreadth challenge in the circuit court. This contention is without merit. Jaynes raised it in his brief in support of his motion to dismiss, the Commonwealth addressed a facial challenge in response and the circuit court in its letter opinion

(Continued on following page)

The Commonwealth contends Jaynes has no standing to raise a First Amendment overbreadth defense. Citing the decision of the United States Supreme Court in *Hicks II,* the Commonwealth argues

> there is no federal law obligation for state courts to hear facial challenges alleging overbreadth. While the question of whether a statute is overbroad is a matter of federal constitutional law, the question of who may bring a facial challenge alleging overbreadth is a matter of *state law.*
>
> . . . .
>
> In other words, the fact that Jaynes could bring his facial challenge alleging overbreadth in federal court is irrelevant. The issue is whether Jaynes may bring his facial challenge alleging overbreadth in the Virginia state courts.

The Commonwealth concludes that based on *Hicks II* "except where there is no set of circumstances where the statute is constitutional, or where a litigant is engaged in non-commercial speech, this Court, as a matter of state law, should entertain only as-applied challenges." (citation omitted).

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labeled Jaynes' argument "a broad, general, facial First Amendment challenge."

Jaynes responds that *Hicks II* does not support the rule on standing advocated by the Commonwealth. He contends "[a]lthough *Hicks* [*II*] permits state courts to allow *more* facial challenges than federal law would permit, it does not authorize state courts to accept *fewer* facial challenges." Citing *New York v. Ferber,* 458 U.S. 747, 767 (1982), Jaynes maintains that the overbreadth doctrine is a "constitutional *exception* to state and federal rules of standing, which ordinarily limit parties to as-applied challenges to statutes."[8]

The Commonwealth bases its position on the following discussion of standing in the *Hicks II* opinion:

> [O]ur standing rules limit only the *federal* courts' jurisdiction over certain claims. State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law. Whether Virginia's courts should have entertained *this* overbreadth challenge is entirely a matter of state law.

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[8] Jaynes' arguments as to the effect of *Hicks II* and response to the Commonwealth's position that states can set whatever standing rules they choose for First Amendment overbreadth claims were not made until his petition for rehearing and brief on rehearing. Even though Jaynes failed in his opening or reply briefs to address the standing issue as presented by the Commonwealth, that issue is properly before us and we address it because the issue was raised and placed before the Court by the Commonwealth.

Hicks II, 539 U.S. at 120 (citation omitted) (emphasis added).

On its face, and without context, this passage from *Hicks II* appears to support the rule of standing advocated by the Commonwealth. In a nutshell, that rule would be that state courts are not required to apply the same standing requirements to a claimant who raises a First Amendment overbreadth challenge to a state statute in a state court as would be accorded that claimant in a federal court considering a similar First Amendment overbreadth claim. However, when viewed in the context of the standing issue actually presented in *Hicks II,* and the longstanding Fourteenth Amendment jurisprudence by which First Amendment rights are made applicable in state court proceedings, we disagree with the Commonwealth's arguments.

In *Commonwealth v. Hicks,* 264 Va. 48, 563 S.E.2d 674 (2002) ("*Hicks I*") this Court accorded standing to that defendant to raise a First Amendment overbreadth challenge to certain policies of the Richmond Redevelopment and Housing Authority (RRHA). 264 Va. at 55-56, 563 S.E.2d at 678-79. Hicks had been banned from RRHA property because of prior trespass and property damage offenses, but continued to trespass on RRHA property. *Id.* at 52-53, 563 S.E.2d at 676-77. Upon his subsequent trespass arrest and conviction, Hicks asserted that he had a right to assert that the RRHA policies determining which persons would be barred from access to its properties were overbroad under the

First Amendment and thus his conviction was invalid. *Id.* at 54, 563 S.E.2d at 677-78. Although Hicks did not contend that he had engaged in any expressive conduct or that the trespass statute under which he was convicted was invalid, this Court in *Hicks I* reversed his conviction because it concluded the RRHA trespass policy "also prohibits speech and conduct that are clearly protected by the First Amendment." *Id.* at 58, 563 S.E.2d at 680.

Upon appeal to the United States Supreme Court, the Commonwealth did "not ask the Court to abolish the overbreadth doctrine, only to place meaningful limits on its use." Brief of Petitioner, *Virginia v. Hicks,* No. 02-371, at 18 (Mar. 7, 2003). The Commonwealth argued on brief that "the Supreme Court of Virginia treated the [overbreadth] doctrine as if it were virtually unbounded," *id.* at 19, and consequently *Hicks I* "represents a *radical* expansion of the overbreadth doctrine." *Id.* (emphasis added). This was so, the Commonwealth argued, because the *Hicks I* view of overbreadth standing "has no precedent in this Court's jurisprudence," *id.* at 21, and urged the Court to limit First Amendment overbreadth standing to persons who "at least show (1) that his own conduct involved some sort of expressive activity, and (2) that his conduct falls within the particular prohibition he challenges as overbroad." *Id.* at 25. Because Hicks conceded his trespass was not expressive activity and he did not challenge the trespass statute under which he was

convicted as overbroad, the Commonwealth's position before the United States Supreme Court in *Hicks II* was that Hicks' conduct failed to meet its proposed overbreadth standing rule. At no point, on brief or in oral argument before the Supreme Court, did the Commonwealth argue the standing rule it now posits: that state courts are free to set their own standing rules in cases involving First Amendment overbreadth claims. In point of fact, as the foregoing illustrates, the Commonwealth argued the polar opposite: that state court standing rules should be constrained.

The oral argument in *Hicks II* makes this conclusion unmistakable and reflects the Commonwealth's clear acknowledgement of a First Amendment overbreadth rule that is directly contrary to the position it now advances in the case at bar. In discussing the Virginia Supreme Court's resolution of standing in *Hicks I,* the following colloquy took place between members of the Court and counsel for the Commonwealth:

> QUESTION: The issue is whether – whether [Virginia] adopted a broader interpretation under State law than Federal law would require.
>
> . . . .
>
> [ANSWER]: That is correct. A – a State may well be able to adopt a broader interpretation of standing than this Court requires, *but it cannot adopt a narrower interpretation. It cannot disregard this*

> *Court's direction that you give overbreadth standing according to the Federal constitutional standards. . . .*
>
> QUESTION: And if they were correct about what our standing rules are, they would have to follow those standing rules, wouldn't they? They could not apply a narrower . . . basis for standing, could they?
>
> [ANSWER]: That is absolutely correct, Your Honor. *The State supreme court has no discretion to disregard this Court's application of the First Amendment through its overbreadth doctrine.*

Oral Arg. Tr., *Virginia v. Hicks,* No. 02-371, at 5 (Apr. 30, 2003) (emphasis added).

It is thus clear that the opinion of the United States Supreme Court in *Hicks II* addressed the issue of First Amendment standing only in the context by which that issue was placed before the Court: whether a state's *expansion* of First Amendment standing was subject to review by federal courts. When the *Hicks II* opinion states "[w]hether Virginia's courts should have *entertained this* overbreadth challenge is entirely a matter of state law," *Hicks II,* 539 U.S. at 120, the term "this" plainly limits the standing issue to what was before the Court in *that* case: an expansion, not a restriction, of state court standing.

Thus, read in context, the seemingly broad language about standing in the *Hicks II* opinion

cannot have the meaning now espoused by the Commonwealth. This view is amply verified by decades of Fourteenth Amendment jurisprudence that establishes First Amendment rights, among others, as applicable in state court proceedings. In 1925, the United States Supreme Court enunciated the principle "that freedom of speech and of the press – which are protected by the First Amendment from abridgement by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York,* 268 U.S. 652, 666 (1925); *accord Stromberg v. California,* 283 U.S. 359, 368 (1931) ("the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech").

The Supreme Court has also recognized that the assertion of a First Amendment overbreadth claim is not the application of a procedural rule, but a substantive part of the First Amendment. "[O]verbreadth is a function of substantive First Amendment law." *Sabri v. United States,* 541 U.S. 600, 610 (2004) (citing Henry P. Monaghan, *Overbreadth,* 1981 S.Ct. Rev. 1, 24). As a matter of substantive law, the First Amendment overbreadth doctrine is a constitutional exception to state and federal rules of standing that would otherwise limit a party to an as-applied challenge to a statute. Thus, "[a] state court is not free to avoid a proper facial

attack on federal constitutional grounds." *New York v. Ferber*, 458 U.S. 747, 767 (1982).

To accept the Commonwealth's view of *Hicks II* would permit, under the guise of standing, a state court to ignore the substantive constitutional rights of citizens in contravention of the Fourteenth Amendment. That is an untenable position because the right to assert the protection of the First Amendment (by overbreadth or otherwise) can no more be restricted by a state rule of standing than the exclusionary rule applied to impermissible searches and seizures could be limited by state evidence law.

Thus, read in context, *Hicks II* does not support the argument on standing advanced by the Commonwealth. To the contrary, as the Commonwealth expressly admitted before the United States Supreme Court, a state supreme court has no discretion to disregard the United States Supreme Court's application of the First Amendment through its overbreadth doctrine because it cannot disregard the Court's direction that overbreadth standing be given according to the Federal constitutional standards. Oral Arg. Tr., *Virginia v. Hicks*, No. 02-371, at 5. Accordingly, we hold Jaynes has standing to raise the First Amendment overbreadth claim.[9]

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[9] The Commonwealth also argues an alternate standing rule: that standing in First Amendment overbreadth cases not extend to persons who engage only in commercial speech. That

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2. TRESPASS

The Commonwealth argues, in the alternative, that if Jaynes has standing to raise a First Amendment overbreadth claim, that claim is not proper for consideration because his conduct was a form of trespass and thus not entitled to First Amendment protection. Code § 18.2-152.3:1, in the Commonwealth's view, is like a trespass statute, prohibiting trespassing on the privately owned e-mail servers through the intentional use of false information and that no First Amendment protection is afforded in that circumstance. The Court of Appeals adopted this position and held Jaynes' First Amendment argument was "not relevant." *Jaynes v. Commonwealth,* 48 Va. App. 673, 693, 634 S.E.2d 357, 367 (2006). Concluding that Code § 18.2-152.3:1 "prohibits lying to commit a trespass," *id.* at 693, 634 S.E.2d at 366, the Court of Appeals determined the "statute proscribes intentional falsity as a machination to make massive, uncompensated use of the private property of an ISP. Therefore, the statute cannot be overbroad because no protected speech whatsoever falls within its purview." *Id.* at 693, 634 S.E.2d at 367. We disagree.

Trespass is the unauthorized use of or entry onto another's property. *See e.g., Vines v. Branch,* 244 Va.

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rule was previously rejected in *Bigelow v. Virginia,* 421 U.S. 809, 817 (1975); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 770 (1976) ("commercial speech, like other varieties, is protected").

185, 190, 418 S.E.2d 890, 894 (1992) ("Where a person has illegally seized the personal property of another and converted it to his own use, the owner may bring an action in *trespass,* trover, detinue, or assumpsit.") (emphasis added); Code § 18.2-119, -125, -128, -132.

Significantly, Code § 18.2-152.3:1 does not prohibit the *unauthorized* use of privately owned e-mail servers. The statute only prohibits the intentional use of false routing information in connection with sending certain e-mail through such servers. Thus, even if an e-mail service provider specifically allowed persons using false IP addresses and domain names to use its server, the sender could be prosecuted under Code § 18.2-152.3:1 although there was no unauthorized use or trespass. Therefore, Code § 18.2-152.3:1 is not a trespass statute.

The Commonwealth's argument that there is no First Amendment right to use false identification to gain access to private property is inapposite. First, in making this argument the Commonwealth uses the terms "false" and "fraudulent" interchangeably. Those concepts are not synonymous.[10] At issue here is the statute's prohibition of "false" routing information. Second, the cases upon which the Commonwealth

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[10] Fraud involves a false representation of a material fact, made intentionally, which induces reliance on that false representation, and resulting damage. *Klaiber v. Freemason Assocs.*, 266 Va. 478, 485, 587 S.E.2d 555, 558 (2003).

relies are civil cases between Internet service providers and the entities engaged in sending commercial unsolicited bulk e-mails: *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997), *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F.Supp. 436 (E.D. Pa. 1996), and *America Online, Inc. v. IMS*, 24 F.Supp.2d 548 (E.D. Va. 1998). In litigation between these private parties, the courts have held that the unauthorized use of the Internet service providers' property constituted common law trespass and that a First Amendment claim could not be raised against the owner of private property. These cases have no relevance here because this is not a trespass action by a private property owner and the First Amendment right is not being asserted against the owner of private property, but against government action impacting the claimed First Amendment right. Accordingly, we reject the Commonwealth's argument and hold the Court of Appeals erred in this regard.

3. CONSTITUTIONALITY OF CODE § 18.2-152.3:1

We now turn to Jaynes' contention that Code § 18.2-152.3:1 is unconstitutionally overbroad. To address this challenge, we first review certain technical aspects of the transmission of e-mails. In transmitting and receiving e-mails, the e-mail servers use a protocol which prescribes what information one

computer must send to another.[11] This SMTP requires that the routing information contain an IP address and a domain name for the sender and recipient of each e-mail. Domain names and IP addresses are assigned to Internet servers by private organizations through a registration process. To obtain an IP address or domain name, the registrant pays a fee and provides identifying contact information to the registering organization. The domain names and IP addresses are contained in a searchable database which can associate the domain name with an IP address and vice versa.

The IP address and domain name do not directly identify the sender, but if the IP address or domain name is acquired from a registering organization, a database search of the address or domain name can eventually lead to the contact information on file with the registration organizations. A sender's IP address or domain name which is not registered will not prevent the transmission of the e-mail; however, the identity of the sender may not be discoverable through a database search and use of registration contact information.[12]

As shown by the record, because e-mail transmission protocol requires entry of an IP address

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[11] The protocol is the product of private collaboration and not established by a governmental entity.

[12] In this case Jaynes used registered IP addresses, although the domain names were false.

and domain name for the sender, the only way such a speaker can publish an anonymous email is to enter a false IP address or domain name. Therefore, like the registration record on file in the mayor's office identifying persons who chose to canvass private neighborhoods in *Watchtower Bible & Tract Society v. Village of Stratton,* 536 U.S. 150 (2002), registered IP addresses and domain names discoverable through searchable data bases and registration documents "necessarily result[ ] in a surrender of [the speaker's] anonymity." 536 U.S. at 166. The right to engage in anonymous speech, particularly anonymous political or religious speech, is "an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342 (1995). By prohibiting false routing information in the dissemination of e-mails, Code § 18.2-152.3:1 infringes on that protected right. The Supreme Court has characterized regulations prohibiting such anonymous speech as "a direct regulation of the content of speech." *Id.* at 345.

State statutes that burden "core political speech," as this statute does, are presumptively invalid and subject to a strict scrutiny test. Under that test a statute will be deemed constitutional only if it is narrowly drawn to further a compelling state interest. *Id.* at 347. In applying this test, we must also consider that state statutes are presumed constitutional, *City Council v. Newsome,* 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984), and any reasonable doubt regarding constitutionality must be resolved in

favor of validity. *In re Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003).

There is no dispute that Code § 18.2-152.3:1 was enacted to control the transmission of unsolicited commercial bulk e-mail, generally referred to as SPAM. In enacting the federal CAN-SPAM Act, Congress stated that commercial bulk e-mail threatened the efficiency and convenience of e-mail. 15 U.S.C. § 7701(a)(2). Many other states have regulated unsolicited bulk e-mail but, unlike Virginia, have restricted such regulation to commercial e-mails. *See e.g.,* Ariz. Rev. Stat. § 44-1372.01; Ark. Code Ann. § 4-88-603; Cal. Bus. & Prof. Code § 17538.45; Fla. Stat. § 668.603; Idaho Code § 48-603E; Ill. Comp. Stat., tit. 815 § 511/10; Ind. Code § 24-5-22-7; Kan. Stat. Ann. § 50-6, Md. Code Ann., Commercial Law § 14-3002. There is nothing in the record or arguments of the parties, however, suggesting that unsolicited non-commercial bulk e-mails were the target of this legislation, caused increased costs to the Internet service providers, or were otherwise a focus of the problem sought to be addressed by the General Assembly through its enactment of Code § 18.2-152.3:1.

Jaynes does not contest the Commonwealth's interest in controlling unsolicited commercial bulk e-mail as well as fraudulent or otherwise illegal e-mail. Nevertheless, Code § 18.2-152.3:1 is not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected

speech such as pornography or defamation speech. Therefore, viewed under the strict scrutiny standard, Code § 18.2-152.3:1 is not narrowly tailored to protect the compelling interests advanced by the Commonwealth.

4. SUBSTANTIAL OVERBREADTH

The Commonwealth argues that we should not preclude enforcement of Code § 18.2-152.3:1 because, even if unconstitutionally overbroad, that remedy is limited to those statutes that are substantially overbroad. The concept of substantial overbreadth is not a test of the constitutionality of a statute, but a policy related to the remedy flowing from a successful facial challenge. A successful facial overbreadth challenge precludes the application of the affected statute in all circumstances. Recognizing the sweep of this remedy, the United States Supreme Court has stated that it will not impose such an expansive result where the chilling effect of an overbroad statute on constitutionally protected rights cannot justify prohibiting all enforcement of the law. "For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech. . . ." *Hicks II,* 539 U.S. at 119. Thus a statute should be declared facially overbroad and unconstitutional only if the statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 118-19 (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)).

The Commonwealth argues that Code § 18.2-152.3:1 is not substantially overbroad because it does not impose any restrictions on the content of the e-mail and "most" applications of its provisions would be constitutional, citing its application to unsolicited bulk commercial e-mail, unsolicited bulk e-mail that proposes a criminal transaction, and unsolicited bulk e-mail that is defamatory or contains obscene images. According to the Commonwealth an "imagine[d] hypothetical situation where the Act might be unconstitutional as applied does not render the Act substantially overbroad."

The United States Supreme Court recently reviewed the First Amendment overbreadth doctrine in *United States v. Williams,* 553 U.S. ___, 128 S.Ct. 1830 (2008). The Court noted

> [i]n order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
>
> . . . [I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.

553 U.S. at ___, 128 S.Ct. at 1838. Applying that inquiry under *Williams* in this case is relatively straightforward as Code § 18.2-152.3:1 would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech. For example,

were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute. Such an expansive scope of unconstitutional coverage is not what the Court in *Williams* referenced "as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." 553 U.S. at ___, 128 S.Ct. at 1843. We thus reject the Commonwealth's argument that Jaynes' facial challenge to Code § 18.2-152.3:1 must fail because the statute is not "substantially overbroad."

5. NARROWING CONSTRUCTION

Lastly, the Commonwealth asserts that we need not declare Code § 18.2-152.3:1 unconstitutional because a limiting construction can be adopted by this Court that would prevent invalidating the statute. Such a construction according to the Commonwealth would be a declaration that the statute does not apply to "unsolicited bulk non-commercial e-mail that does not involve criminal activity, defamation or obscene materials." Alternatively the Commonwealth suggests that we hold the statute applies only in instances where the receiving Internet service provider "actually objects to the bulk e-mail."

Our jurisprudence requires us to interpret a statute to avoid a constitutional infirmity. *Burns v. Warden,* 268 Va. 1, 2, 597 S.E.2d 195, 196 (2004). Nevertheless, construing statutes to cure

constitutional deficiencies is allowed only when such construction is reasonable. *Virginia Soc'y for Human Life v. Caldwell,* 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998). A statute cannot be rewritten to bring it within constitutional requirements. *Reno v. ACLU,* 521 U.S. 844, 884-85 & nn.49-50 (1997); *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 397 (1988). The construction urged by the Commonwealth is not a reasonable construction of the statute. Nothing in the statute suggests the limited applications advanced by the Commonwealth. If we adopted the Commonwealth's suggested construction we would be rewriting Code § 18.2-152.3:1 in a material and substantive way. Such a task lies within the province of the General Assembly, not the courts. *Jackson v. Fidelity & Deposit Co.,* 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.").

III. CONCLUSION

For the foregoing reasons, we hold that the circuit court properly had jurisdiction over Jaynes. We also hold that Jaynes has standing to raise a First Amendment overbreadth claim as to Code § 18.2-152.3:1. That statute is unconstitutionally overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment to

the United States Constitution. Accordingly, we will reverse the judgment of the Court of Appeals and vacate Jaynes' convictions of violations of Code § 18.2-152.3:1.[13]

Reversed and final judgment.

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[13] In light of this holding, we do not address Jaynes' other assignments of error.

Present: Hassell, C.J., Koontz, Kinser, Lemons, and Agee, JJ., and Russell and Lacy, S.JJ.

JEREMY JAYNES

v. Record No. 062388

COMMONWEALTH OF VIRGINIA

OPINION BY
JUSTICE G. STEVEN AGEE
February 29, 2008

FROM THE COURT OF APPEALS OF VIRGINIA

Jeremy Jaynes appeals from the judgment of the Court of Appeals which affirmed his convictions in the Circuit Court of Loudoun County for violations of Code § 18.2-152.3:1, the unsolicited bulk electronic mail (e-mail) provision of the Virginia Computer Crimes Act, Code §§ 18.2-152.1 through-152.15. For the reasons set forth below, we will affirm the judgment of the Court of Appeals.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

From his home in Raleigh, North Carolina, Jaynes used several computers, routers and servers to send over 10,000 e-mails within a 24-hour period to subscribers of America Online, Inc. (AOL) on each of three separate occasions. On July 16, 2003, Jaynes sent 12,197 pieces of unsolicited e-mail with falsified routing and transmission information onto AOL's proprietary network. On July 19, 2003, he sent 24,172, and on July 26, 2003, he sent 19,104. None of the recipients of the e-mails had requested any communication from Jaynes. He intentionally

falsified the header information and sender domain names before transmitting the e-mails to the recipients, causing the Internet Protocol (IP) addresses to convey false information to every recipient about Jaynes' identity as the sender.[1] However, investigators used a sophisticated database search to identify Jaynes as the sender of the e-mails.[2] Jaynes was arrested and charged with violating Code § 18.2-152.3:1, which provides in relevant part:

> A. Any person who:
> 1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers . . . is guilty of a Class 1 misdemeanor.

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[1] Simple Mail Transfer Protocol (SMTP) is what an e-mail server uses to transmit an e-mail message, and the SMTP requires verification of the sender's IP address and domain. Evidence at trial demonstrated that Jaynes sent the e-mails with nonexistent domains which did not correspond to the sending IP addresses.

[2] Computers may be identified by their unique IP address number, which consists of blocks of numerals separated by periods.

> E. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:
> 1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period. . . .

Jaynes moved to dismiss the charges against him on the grounds that the statute violated the dormant Commerce Clause, was unconstitutionally vague, and violated the First Amendment. The circuit court denied that motion.

During trial, evidence demonstrated that Jaynes knew that all of the more than 50,000 recipients of his unsolicited e-mails were subscribers to AOL, in part, because the e-mail addresses of all recipients ended in "@aol.com" and came from discs stolen from AOL. Jaynes' e-mails advertised one of three products: (1) a FedEx refund claims product, (2) a "Penny Stock Picker," and (3) a "History Eraser" product.[3] To purchase one of these products, potential buyers would click on a hyperlink within the e-mail, which redirected them outside the e-mail, where they could consummate the purchase. Jaynes operated his

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[3] Although Jaynes advertised only three products, he created false sender information for each e-mail, using thousands of different IP addresses, user names and website links.

enterprise through several companies which were not registered to do business in North Carolina, and evidence was introduced as to billing and payment activities for these companies, including evidence that registration fees were paid to AOL with credit cards held by fictitious account holders.[4]

While executing a search of Jaynes' home, police discovered a cache of compact discs (CDs) containing over 176 million full e-mail addresses and 1.3 billion e-mail user names. The search also led to the confiscation of a storage disc which contained AOL e-mail address information and other personal and private account information for millions of AOL subscribers. Police also discovered multiple storage discs which contained 107 million AOL e-mail addresses. Richard Rubenstein, manager of technical security investigations at AOL, testified that the discs recovered at Jaynes' home "contained proprietary information" of "pretty near all" AOL account customers.[5] The AOL user information had been

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[4] Jaynes' enterprises were apparently quite successful. Although not introduced as evidence during the guilt stage of the trial, counsel for the Commonwealth informed the Court following the jury verdict against Jaynes and during the discussion of bond for Jaynes that Jaynes' "[p]ersonal financing statement list[s] assets at $17 million and a net worth of $24 million," and his income from all of his businesses exceeded $1 million in 2001, 2002 and 2003.

[5] The data on the disc contained, among other things, "a raw dump of the AOL member database" which "contains information about [AOL] subscribers, how they choose to be

(Continued on following page)

stolen from AOL by a former employee and was in Jaynes' possession.

Dr. John Levine, a consultant and author, testified as an expert witness and explained that the e-mails sent by Jaynes were not consistent with solicited bulk e-mail, but rather constituted unsolicited bulk e-mail (sometimes referred to as "spam" e-mail) because Jaynes had disguised the true sender and header information and used multiple addresses to send the e-mails. He explained:

> [H]ere the [e-mail] has been spread around nearly a thousand addresses. Where it's reasonable that you might use maybe a dozen addresses if you have a really big system and you're sending it from a dozen computers, I can't think of a valid reason why you would need to spread your e-mail over a thousand different addresses unless, again, you're trying to disguise the source.
>
> The fact – both the fact that the domains do not seem plausible, they don't seem familiar, and the fact that it's spread out in a way that seems intended to disguise th origin of the mail, is what tells me this is not solicited e-mail.

AOL, which houses all of its e-mail servers in Virginia, was directly affected by Jaynes' spam e-mail

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billed, their email address, specific AOL data fields such as an account number, things of that nature."

attack.[6] Brian Sullivan, the senior technical director for mail operations at AOL, testified that bulk e-mail "tends to create a lot of confusion" for AOL customers and that AOL receives "7 to 10 million complaints per day" regarding spam e-mails. Sullivan also described the impact of spam e-mails, explaining that "[i]f someone's mailbox is full because they got a truckload of spam and there's no more room, a message coming from Grandma is returned back to the sender. We can't take it at that point."

A jury convicted Jaynes of three counts of violating Code § 18.2-152.3:1, and the circuit court sentenced Jaynes to three years in prison on each count, with the sentences to run consecutively for an active term of imprisonment of nine years. The Court of Appeals affirmed his convictions, *Jaynes v. Commonwealth,* 48 Va. App. 673, 634 S.E.2d 357 (2006). We awarded Jaynes an appeal.

II. ANALYSIS

Jaynes makes four distinct assignments of error to the judgment of the Court of Appeals. First, he assigns error to the determination that the circuit court had jurisdiction over him on the crimes charged. Second, Jaynes contends Code § 18.2-152.3:1 "abridge[s] the First Amendment right to anonymous

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[6] At trial, evidence demonstrated that all of AOL's servers were located in Virginia, although some were located in Loudoun County and others were located in Manassas.

speech," and it was error not to reverse his convictions on that basis. Separately, Jaynes assigns as error the failure of the Court of Appeals to hold that Code § 18.2-152.3:1 is void for vagueness. Lastly, Jaynes posits that the statute violates the Commerce Clause of the United States Constitution.

A. Jurisdiction

Jaynes asserts that the Court of Appeals erred in holding that the circuit court had jurisdiction over him for violating Code § 18.2-152.3:1 because he did not "use" a computer in Virginia. He contends that a violation of that statute can occur only in the location where the e-mail routing information is falsified. Jaynes maintains that because he only used computers to send the e-mails from his home in Raleigh, North Carolina, he committed no crime in Virginia. Further, because he had no control over the routing of the e-mails, he argues his actions did not have an "immediate result" in Virginia, and under *Moreno v. Baskerville,* 249 Va. 16, 452 S.E.2d 653 (1995), could not be the basis for jurisdiction over him by Virginia courts. Therefore, according to Jaynes, the circuit court had no jurisdiction over him and his convictions are void.

To successfully prosecute a crime under Code § 18.2-152.3:1(B), the Commonwealth must establish all the elements of that crime. In addition to the element of transmission volume within a specific time period, the Commonwealth must prove the sender

used a computer and that such use was with the intent of falsifying routing information. The Commonwealth must also prove that the transmission of such false routing information occurred in connection with the use of an e-mail provider's computer network for that transmission. Thus, the crime is not complete until there is e-mail transmission passing through or into the computer network of the e-mail provider or subscriber containing the false routing information.

Jaynes argues that he "merely sent e-mails that happened to be routed through AOL servers." We disagree. As the evidence established, all e-mail must flow through the recipient's e-mail server in order to reach the intended recipient. By selecting AOL subscribers as his e-mail recipients, Jaynes knew and intended that his e-mails would utilize AOL servers because he clearly intended to send to users whose e-mails ended in "@aol.com." The evidence established that the AOL servers are located in Virginia, and that the location of AOL's servers was information easily accessible to the general public. Applying our standard of review to the evidence presented along with all reasonable inferences therefrom, we conclude that the evidence supports the conclusion that Jaynes knew and intended that the e-mails he sent to AOL subscribers would utilize AOL's servers which are located in Virginia. Thus an intended and necessary result of Jaynes' action, the e-mail transmission through the computer network, occurred in Virginia.

Furthermore, a state may exercise jurisdiction over criminal acts that are committed outside the state, but are intended to, and do in fact, produce harm within the state. "'It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit.'" *Travelers Health Ass'n v. Commonwealth,* 188 Va. 877, 892, 51 S.E.2d 263, 269 (1949) (citing *Strassheim v. Daily,* 221 U.S. 280, 284-85 (1911)).

Jaynes, relying on *Moreno,* argues that this principle, referred to as the "immediate result doctrine," is not applicable if third parties intervene between the out-of-state conduct and the in-state harm. In *Moreno,* the defendant, while in Arizona, arranged for delivery of drugs to an accomplice in Arizona who, in turn, delivered the drugs to two other accomplices who ultimately sold the drugs in Virginia. 249 Va. at 17-18, 452 S.E.2d at 654. Noting that drug distribution is not a continuing offense and that payment is not an element of the crime of drug distribution, *id.* at 18-20, 452 S.E.2d at 654-55, we concluded that the discrete crime of drug distribution was committed by the defendant while in Arizona and that the ultimate sale of the drugs in Virginia was not the "immediate result" of the distribution of drugs in Arizona because the subsequent distributions by Moreno's accomplices intervened. *Id.* at 19, 452 S.E.2d at 655.

Jaynes argues that an e-mail could be routed through a number of different mail handling networks before the e-mail reaches its destination, and that an e-mail sender cannot control the route used. Such routing, Jaynes contends, is the same type of intervention which occurred in *Moreno*. Therefore, according to Jaynes, the intervention of intermediate e-mail routers and servers prior to arrival of the e-mails at the AOL servers shows that the alleged harm through the AOL servers in Virginia was not the "immediate result" of Jaynes' actions in North Carolina.

Jaynes' reliance on *Moreno* fails because, as noted above, Jaynes' affirmative act of selecting AOL subscribers as recipients of his e-mails insured the use of AOL's computer network to deliver the e-mails and such use was the "immediate result" of Jaynes' action, regardless of any intermediate routes taken by the e-mails. Because the use of the computer network of an e-mail service provider or its subscribers is an integral part of the crime charged and because the use of AOL's e-mail servers was the "immediate result" of Jaynes' acts, we hold that Jaynes was amenable to prosecution in Virginia for a violation of Code § 18.2-152.1:3. Accordingly, the circuit court had jurisdiction over Jaynes.

B. First Amendment Standing

Jaynes next contends that Code § 18.2-152.3:1 is constitutionally deficient as overbroad under the

First Amendment and therefore the statute cannot be enforced. He argues the Court of Appeals erred in affirming the circuit court's judgment which did not grant his motion to dismiss. Jaynes contends that under First Amendment jurisprudence, he has standing to raise the First Amendment claims of third parties and use those claims to defend his unrelated case. The Commonwealth initially responds that Jaynes lacks standing to raise a First Amendment challenge to the statute and therefore the First Amendment issues raised by Jaynes should not be addressed. The opinion of the Court of Appeals did not address the issue of standing as it decided the First Amendment claim on the merits. Because we hold the standing issue is dispositive, we do not address the analysis of the Court of Appeals.

Jaynes does not contest that he transmitted the tens of thousands of e-mails containing false and misleading sender information in contravention of Code § 18.2-152.3:1. He does not deny that act occurred, in fact, on several occasions, each of which was in direct violation of Code § 18.2-152.3:1(B).[7] Further, Jaynes does not contest that the bulk e-mails were an attempt by him to sell commercial products for his pecuniary gain and constitute, in this case, unprotected commercial speech for First Amendment purposes. In other words, he does not

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[7] The misdemeanor provisions of Code § 18.2-152.3:1(A) are not before the Court.

dispute the e-mails have no First Amendment protection in their own right, and that the statute is not unconstitutional as applied to him.

Neither does Jaynes make a pure facial challenge to the statute alleging "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). Instead, in First Amendment parlance, Jaynes challenges the statute by claiming unconstitutional overbreadth. *See Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003).[8] That is, Jaynes contends that because the statute could potentially reach the protected speech of a third party, a hypothetical person neither charged with a crime nor before this Court, he (Jaynes) is entitled to claim exoneration for his unprotected commercial speech because Code § 18.2-152.3:1 could encompass an unknown individual's potentially protected speech. This concept of the invalidity of a criminal statute as overbroad under the First Amendment is Jaynes' basis to assert he has standing to contest an otherwise valid conviction for admitted criminal conduct.

If Jaynes' claim of overbreadth invalidity were brought under nearly any other constitutional basis

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[8] Unlike a "facial" or "as applied" challenge, an overbreadth challenge "suffices to invalidate all enforcement of that law" upon showing that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks,* 539 U.S. at 118-19 (2003) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)).

than the First Amendment, it is clear he would have no standing to assert the claims of others. *See Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 796 (1984) ("the general rule [is] that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court"); *United States v. Raines,* 362 U.S. 17, 21 (1960) ("one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"). However, the United States Supreme Court has recognized an exception to the ordinary rules of standing when constitutional claims involve the First Amendment.

For example, in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), the Court noted the permissive standard for First Amendment standing:

> As a corollary, the Court has altered its traditional rules of standing to permit – in the First Amendment area – "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister,* [380 U.S. 479, 486 (1965)]. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others

> not before the court to refrain from constitutionally protected speech or expression.

413 U.S. at 612; *see New York v. Ferber,* 458 U.S. 747, 768-69 (1982) (citations omitted) ("The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . . . What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by 'weighty countervailing policies'. . . . The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted").

While cases such as *Broadrick* reflect broader standing for First Amendment overbreadth challenges, the decision of the United States Supreme Court in *Hicks* made clear that those rules of standing apply in federal courts where federal jurisdiction is at issue. The Supreme Court in *Hicks* leaves to the states an independent decision on overbreadth standing in a First Amendment context where the claim is made in a state court regarding a state statute.

1. *Virginia v. Hicks*

In *Hicks,* the United States Supreme Court confirmed that the several states have the constitutional authority to determine independently whether to allow a First Amendment overbreadth challenge to a state statute.

> [O]ur standing rules limit only the *federal* courts' jurisdiction over certain claims. State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law. Whether Virginia's courts . . . entertain [an] overbreadth challenge is entirely a matter of state law.

Hicks, 539 U.S. at 120 (citation omitted).

The Supreme Court in *Hicks* makes clear that the *Broadrick* standing concept applies only in the federal courts because: "our standing rules limit only the *federal* courts' jurisdiction over certain claims." 539 U.S. at 120. While there is federal precedent to support Jaynes' claim of standing if his case were in a federal court on the issue of federal jurisdiction, it is noteworthy that the Supreme Court declined to opine on that issue in *Hicks*:

> We accordingly proceed to [the] merits inquiry, leaving for another day the question whether our ordinary rule that a litigant may not rest a claim to relief on the legal rights or interests of third parties, *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454

> U.S. 464, 474 (1982), would exclude a case such as this from initiation in federal court.

After *Hicks,* there is no doubt that Virginia can establish the standing requirement for a litigant, like Jaynes, who brings a First Amendment overbreadth challenge. 539 U.S. at 120. The issue then becomes what, if any, First Amendment standing requirement has been adopted in Virginia.

2. Virginia Standing

Citing *Stanley v. City of Norfolk,* 218 Va. 504, 237 S.E.2d 799 (1977), Jaynes argues there is an established First Amendment overbreadth standing requirement and relies on the following statement we made in *Stanley*:

> [I]t appears that, for purposes of standing to make facial attacks, the Supreme Court makes a distinction between two separate concepts of overbreadth, *viz.*, (a) *due process overbreadth* resulting from statutory language so vague that it could be selectively construed and enforced by police, prosecutors, and triers-of-fact to penalize persons not before the court, for conduct not before the court, without fair warning of the criminality of their conduct, and (b) *First Amendment overbreadth* resulting either from statutory language so vague it could "chill" the exercise of constitutionally protected speech or conduct, or from precise statutory language which expressly seeks to regulate protected speech, *Gooding v. Wilson,*

> 405 U.S. 518, 520-22 (1972), or to regulate the time, place, and manner of communicative conduct, *see e.g., Grayned v. City of Rockford,* 408 U.S. 104, 115-21 (1972), or to require prior approval of communicative conduct by officials vested with standardless discretionary power, *see e.g., Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969); or from statutory language which might be so applied as to burden innocent associations, *see e.g., Keyishian v. Board of Regents,* 385 U.S. 589 (1967). It seems clear that, when overbreadth impinges upon First Amendment guarantees, a person accused under the statute has standing to make a facial attack, even though his own speech or conduct was not constitutionally protected; when overbreadth has only due process implications, he has no standing to make a facial attack but only standing to challenge the statute as applied to his own conduct.

218 Va. at 508, 237 S.E.2d at 801-02. However, *Stanley* and other cases Jaynes cites as making similar pronouncements do not have the precedential status he envisions, particularly as they relate to otherwise unprotected commercial speech.[9]

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[9] Jaynes also relies upon our opinions in *Gray v. Commonwealth,* 260 Va. 675, 681, 537 S.E.2d 862, 865 (2000) (holding "[d]efendant has no standing to mount a broad, general, facial statutory challenge because he does not contend his conduct was constitutionally protected nor is the First Amendment implicated"), *Esper Bonding Co. v. Commonwealth,*

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A review of case law on First Amendment standing before and after *Stanley* is particularly instructive. We begin with our decision in *Bigelow v. Commonwealth,* 213 Va. 191, 191 S.E.2d 173 (1972), in which the defendant, Bigelow, was convicted of "encouraging ... the procuring of abortion by publication" when advertisements for abortion services ran in the weekly newspaper he managed. 213 Va. at 191-92, 191 S.E.2d at 174. On appeal, we determined Bigelow had no standing to assert a First Amendment overbreadth challenge to the operation of the statute at issue because his "activity was of a purely commercial nature." *Id.* at 198, 191 S.E.2d at 177. We distinguished our opinion in *Owens* because that case involved unlawful assembly and breach of the peace, not a commercial activity. *Id.*

Upon appeal to the United States Supreme Court, the case was remanded "for further consideration in light of *Roe v. Wade,* 410 U.S. 113 (1973); and *Doe v. Bolton,* 410 U.S. 179 (1973)." *Bigelow v. Virginia,* 413 U.S. 909 (1973). Upon remand, we again affirmed Bigelow's conviction. *Bigelow v. Commonwealth,* 214 Va. 341, 342, 200

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222 Va. 595, 597, 283 S.E.2d 185, 186 (1981) (confirming general rule for standing and noting limited exceptions, including in the First Amendment context), and *Owens v. Commonwealth,* 211 Va. 633, 638-39, 179 S.E.2d 477, 481 (1971) (finding standing to assert First Amendment overbreadth claim regarding a statute which restricted the right to assemble), to support his claim that Virginia allows overbreadth standing in all cases which might implicate the First Amendment.

S.E.2d 680 (1973). The United States Supreme Court, on the second appeal, reversed our judgment. *Bigelow v. Virginia,* 421 U.S. 809 (1975). The Supreme Court opined that this Court "erred in denying Bigelow standing to make this claim . . . without any consideration of whether the alleged overbreadth was or was not substantial," *id.* at 817, but "decline[d] to rest [the] decision on overbreadth and . . . pass[ed] on to the further inquiry . . . whether the statute as applied . . . infringed constitutionally protected speech." *Id.* at 818. Ultimately, the Supreme Court held the statute as applied to Bigelow violated his First Amendment rights. *Id.* at 829.

During the pendency of the second Bigelow appeal in the United States Supreme Court, we decided the case of *Wayside Restaurant, Inc. v. City of Virginia Beach,* 215 Va. 231, 208 S.E.2d 51 (1974). In *Wayside Restaurant,* operators of topless bars challenged an ordinance of the City of Virginia Beach in a declaratory judgment action. 215 Va. at 232, 208 S.E.2d at 52-53. The ordinance, *inter alia,* had been interpreted by the police to prohibit "'topless' female dancers as entertainment" at the operators' bars. *Id.* at 232-33, 208 S.E.2d at 53. In the declaratory judgment action, the operators claimed "the ordinance is overbroad and violates the First Amendment guarantees of free speech and assembly." *Id.* at 233, 208 S.E.2d at 53. The circuit court rejected that claim.

On appeal, this Court noted "the crucial fact that the appellants are admittedly engaged in . . . a

commercial enterprise" and then rejected the operators' First Amendment overbreadth claim for lack of standing. *Id.* at 234-35, 208 S.E.2d at 54.

> The appellants advance a number of arguments that the ordinance is overbroad, *i.e.*, that it would proscribe the wearing of many types of socially acceptable wearing apparel and beach wear, and that dancing, as a form of expression, is speech protected by the First Amendment. The rule is that where, as here, a line can be clearly drawn between commercial and noncommercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. [T]he appellants have no standing to assert the rights of those engaged in noncommercial activity. . . .

Id. (citation omitted).

Although later decisions cited by Jaynes-*Stanley, Esper Bonding Co. v. Commonwealth,* 222 Va. 595, 283 S.E.2d 185 (1981), and *Gray v. Commonwealth,* 260 Va. 675, 537 S.E.2d 862 (2000) – all accorded standing to a defendant to "make a facial challenge invoking the First Amendment rights of third parties," *Esper Bonding Co.,* 222 Va. at 597, 283 S.E.2d at 186, all of those cases involve noncommercial conduct by the defendants. *Stanley* concerned a charge of disorderly conduct during an

assault and raised a due process overbreadth challenge and not a First Amendment claim. 218 Va. at 505-06, 237 S.E.2d at 800. *Esper Bonding Co.* involved the *Commonwealth's* attempt to assert third party rights regarding the forfeiture of a bail bond, which we denied. 222 Va. at 597-98, 283 S.E.2d at 186. *Gray* involved a challenge on vagueness grounds to a statute prohibiting possession of an unregistered silenced firearm. 260 Va. at 680-81, 537 S.E.2d at 865. The distinction between commercial and noncommercial speech set forth in *Wayside Restaurant* was never at issue. More importantly, *Wayside Restaurant* has never been overruled.

Even if the dicta in the Supreme Court's second *Bigelow* decision on First Amendment overbreadth standing was deemed to contradict the conclusion in *Wayside Restaurant,* that dicta has no force after the clear pronouncement in *Hicks.* The authority of the several states to make their own standing rules regarding an overbreadth challenge is unmistakable under *Hicks*: "our standing rules limit only the *federal* courts' jurisdiction. . . . Whether Virginia's courts . . . *entertain* [an] overbreadth challenge is entirely a matter of state law." *Hicks,* 539 U.S. at 120 (citation omitted). Thus, the force, if any, of the earlier Supreme Court decision in *Bigelow* on the issue of Virginia standing is clearly and unequivocally negated by *Hicks.*

As noted earlier, neither *Stanley* nor the other First Amendment standing cases cited by Jaynes addressed the standing distinction set forth in

Wayside Restaurant.[10] Thus, it would appear that Virginia does not accord standing to a person, such as Jaynes, whose actions involve only otherwise unprotected commercial speech, to assert the First Amendment rights of those who engage in noncommercial speech. However, to resolve the case at bar, it is unnecessary to resolve the extent of any precedential value of *Wayside Restaurant.*

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), the United States Supreme Court recognized that certain commercial speech, even that "which does no more than propose a commercial transaction," can be entitled First Amendment protection. 425 U.S. at 776 (Stewart, J., concurring). In later cases, the Supreme Court "recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 455-56 (1978)). "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas,* 447 U.S. at 562-63.

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[10] The dissent's reference to *Commonwealth v. Hicks,* 264 Va. 48, 563 S.E.2d 674 (2002) ("*Hicks I*") is misplaced as that case did not involve commercial speech.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

In *Board of Trustees v. Fox,* 492 U.S. 469 (1989), the Supreme Court re-emphasized the holding in *Central Hudson* that the initial portal through which one claiming First Amendment protection for commercial speech must pass is that such speech "not be misleading." 492 U.S. at 475 (quoting *Central Hudson Gas,* 447 U.S. at 566). Commercial speech which fails this initial test does not receive First Amendment protection. *Id.* As the Court further noted in *Fox,* this result is, in part, due to the realization that "overbreadth analysis does not normally apply to commercial speech, [and] a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground – our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and

not in need of surrogate litigators." *Id.* at 481. While *Central Hudson Gas* and *Fox* did address First Amendment claims on the merits, the condition precedent recognized in each case as to whether a person's commercial speech can be accorded First Amendment protection, that the commercial speech not be misleading, seems equally applicable in an analysis of standing.

There is no question in this case that Jaynes' e-mails "propose a commercial transaction," *Id.* at 482, and are thus some form of commercial speech. As noted earlier, Jaynes makes no claim that his commercial speech, on its own merits, is entitled to any First Amendment protection. Just as clearly, it is self-evident that Jaynes' e-mails are misleading because each contained intentionally false and inaccurate routing and header information intended to shield Jaynes from accountability for his sales schemes. Jaynes does not contest the e-mail routing and header information was false. Thus, Jaynes' commercial speech would fail the initial requirement for First Amendment review under *Central Hudson Gas* and *Fox* because it is "misleading" on its face. In that circumstance, it is reasonable not to accord the speaker of such misleading commercial speech, admittedly unprotected in its own right, standing to vicariously raise the First Amendment claims of others.

We therefore hold that Jaynes has no standing to raise a First Amendment objection to Code § 18.2-152.3:1. No Virginia standing should be

accorded a person to assert an overbreadth challenge when that person's conduct consists of misleading commercial speech that is entitled to no First Amendment protection on its own merits.[11] If we were to rule otherwise, a criminal defendant whose misleading commercial activities are clearly a crime and otherwise unprotected by the First Amendment gets an unrestricted invitation to apply for a "Get Out of Jail Free" card by merely pleading a hypothetical First Amendment infringement upon a hypothetical person not charged with a crime. This fails the test of common sense, but also seems unlikely to be a practical bulwark of defending First Amendment rights as decisions like *Central Hudson Gas* and *Fox* recognize.[12]

Jaynes thus has no standing to challenge the statute in question unless he could show there is no set of circumstances in which Code § 18.2-152.3:1 can

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[11] As Jaynes has no standing under this standard, we do not decide today the continuing precedential effect, if any, of *Wayside Restaurant*. The exception to standing we announce today is narrow and directed. Accordingly, we note that the dissent's statement that "this decision will . . . result in the complete eradication of the standing exception" has no basis in our decision and is unfounded.

[12] *See also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999) (confirming that "[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading"); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (confirming that commercial speech is protected when it is "accurate," "truthful and nonmisleading").

be constitutionally applied. *Salerno,* 481 U.S. at 745; *see Parker v. Levy,* 417 U.S. 733, 760 (1974) ("This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct'") (citations omitted); *see also Davenport v. Washington Educ. Ass'n,* 551 U.S. ___, ___ n.5, 127 S.Ct. 2372, 2382 n.5 (2007). As noted earlier, Jaynes does not make a pure facial challenge to the statute, and we therefore do not consider an argument on that basis. Rule 5:17; Rule 5:25. Moreover, it is self evident Jaynes could not establish that there is no set of circumstances which exist under which the statute would be valid; it is obviously applicable to him. Jaynes therefore lacks standing to raise the First Amendment claim.

C. Vagueness

Jaynes also contends that Code § 18.2-152.3:1 is unconstitutionally void for vagueness and that the Court of Appeals erred in not reversing the judgment of the circuit court on that basis. He argues that the as-applied standard for vagueness used by the Court of Appeals was improper because his challenge was to the facial validity of the statute. The Commonwealth

responds that Jaynes does not have standing to bring a vagueness challenge to the statute because the statute clearly applied to him. We agree with the Commonwealth.

The United States Supreme Court, in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) explained the standard for a vagueness challenge:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. *A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.* A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. at 494-95 (emphasis added). Additionally, the United States Supreme Court stated in *Parker v. Levy*, 417 U.S. 733, 756 (1974), that: "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." This Court, citing *Hoffman Estates* and *Parker*, restated this principle in

Commonwealth v. Hicks, 267 Va. 573, 596 S.E.2d 74 (2004),[13] "[i]t is clear that [one] who . . . engaged in conduct prohibited [by the statute] may not complain that the [statute] is purportedly vague." *Id.* at 581, 596 S.E.2d at 78.

As the United States Supreme Court in *Parker* and *Hoffman Estates,* as well as this Court in *Hicks II,* has made consistently clear, one does not have standing to make a facial challenge to a statute on the basis of unconstitutional vagueness if the statute plainly applies to that person on the facts of the case. As the Supreme Court further stated in *Parker,* "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." 417 U.S. at 757 (citation omitted). Jaynes cannot make this claim.

Jaynes was convicted under the felony provisions of Code § 18.2-152.3:1(B), which clearly sets out what constitutes unsolicited bulk e-mail.[14] Jaynes could not reasonably be unaware from the language of the statute that his multiple transmissions of more than

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[13] *Commonwealth v. Hicks,* sometimes referenced as *Hicks II,* was the case subsequent to *Virginia v. Hicks,* 539 U.S. 113 (2003) and was considered by this Court on remand from the United States Supreme Court. For purposes herein, we will reference this case as *Hicks II.*

[14] Jaynes' counsel admitted during oral argument before this Court that the statutory reference to "bulk" was clearly defined.

10,000 e-mails within the proscribed period violated subsection (B). His claim that he would not understand what constituted "unsolicited bulk electronic mail" is without merit in the clear context of subsection (B) of the statute.

The bulk e-mails were plainly unsolicited given the evidence at trial that Jaynes had received a list of stolen e-mail addresses of AOL customers and there was no evidence any recipient requested or consented to the e-mails. In the context of this record, Jaynes' claim of vagueness for the term "unsolicited" is devoid of merit. Evidence at trial indicated no basis upon which Jaynes could claim vagueness as to the meaning of "falsify" or "electronic mail transmission information." Thus, the statute undoubtedly applies to Jaynes' conduct, and therefore, he has no standing to challenge the statute for vagueness.[15] *Hicks II,* 267 Va. at 580-81, 596 S.E.2d at 78.

D. Dormant Commerce Clause

Jaynes also contends that the Court of Appeals erred because it did not hold that Code § 18.2-152.3:1 violates the Commerce Clause, Art. 1, Section 8 of the United States Constitution. The Commerce Clause provides that, "[t]he Congress shall have power . . .

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[15] A misdemeanor conviction under Code § 18.2-152.3:1, subsection (A), is not before us in this appeal, and we express no opinion as to whether that subsection of the statute may be unconstitutional based on vagueness.

[t]o regulate commerce . . . among the several states." U.S. Const., art. I, § 8, cl. 3. The Commerce Clause has been said to contain a "dormant" aspect which limits a state's ability to "discriminate[ ] against or unduly burden[ ] interstate commerce and thereby imped[e] free private trade in the national marketplace." *PSINet, Inc. v. Chapman,* 362 F.3d 227, 239 (4th Cir. 2004) (citations omitted).

Jaynes sole argument on appeal is that the statute is "*per se* invalid because its practical effect is to regulate wholly extraterritorial e-mail transactions." The Commonwealth acknowledges that a rule of "virtual per se invalidity" applies if a state statute discriminates "either on its face, or in practical effect" against interstate commerce. (Emphasis omitted.)

A state statute may violate the dormant Commerce Clause if it discriminates against interstate commerce, favoring "in-state economic interests over out-of-state interests," *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986), or if it has the "'practical effect' of regulating commerce occurring wholly outside that State's borders." *Healy v. Beer Institute,* 491 U.S. 324, 332 (1989).

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When,

> however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Id. at 337 n.14 (citation omitted).

Jaynes asserts that Code § 18.2-152.3:1 falls within the second category of violation because it affects e-mails that "merely pass through Virginia servers *en route* to their final destinations," thus regulating wholly extraterritorial e-mail transactions.

In rejecting Jaynes' dormant Commerce Clause argument, we first note that his argument contains an inherent contradiction. An e-mail that passes through Virginia cannot be a "wholly extraterritorial" transaction. Nevertheless, the sender of an e-mail cannot insure that the e-mail will not at some point pass through Virginia. This factual reality of e-mail transmission has the potential of burdening interstate commerce because e-mail senders may have a heightened concern of possible criminal prosecution if their e-mails were routed through Virginia without their direction or knowledge.

To determine if this burden invalidates the statute, we apply the balancing test recited in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970): "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

In this case, the legitimate local public interest in preventing the proliferation of falsified unsolicited bulk e-mail, or "spam", is well documented. The Federal Government and many states have adopted anti-spam statutes. *See, e.g.*, Arminda B. Bepko, *Note: A State-By-State Comparison of SPAM Laws,* 13 Media L. & Pol'y 20 (2004). Congress has recognized that unsolicited e-mail may result in costs to recipients, and impose significant monetary costs on providers of Internet access services. 15 U.S.C. § 7701 (2004). Furthermore, Congress has specifically allowed the states to regulate spam that involves "falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b). As noted earlier, Jaynes' e-mails were unquestionably commercial and contained false routing and header information. It is clear that the Commonwealth has a strong local interest in, and gains local benefits from, regulating the type of e-mail proscribed by Code § 18.2-152.3:1.

By contrast, the effects of this statute on interstate commerce are incidental and do not impose an undue burden. Whatever burden there may be is the same for a Virginia or a non-Virginia unsolicited bulk e-mail sender. The only burden placed on the e-mail sender is that the e-mail not contain false or forged transmission information. In the realm of legitimate commercial transactions, true

identification of the market participant would seem to be the norm, not the transmission of e-mails with false identification. In comparing the obvious local benefit with the minimal burden on in-state or out-of-state commerce, both the Court of Appeals and the circuit court cited oft-quoted commentators:

> Even assuming that the antispam laws do not significantly further the state's interest, it is hard to see how the antispam laws burden interstate commerce at all. The spam laws essentially require truthfulness in the header, return address, and subject line of the e-mail. Far from burdening commerce, the truthfulness requirement facilitates it by eliminating fraud and deception. Compliance with the various antispam statutes is easy compared to noncompliance, which requires the spammer to incur costs of forging, re-mailing, and the like.

Jack L. Goldsmith and Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 Yale L.J. 785, 819 (2001).[16]

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[16] Furthermore, it is highly unlikely that the sender of an e-mail which is passed through a router or server in Virginia at the direction of another router or server would be subject to criminal prosecution. Such an actor shares little in common with Jaynes who directed and insured that the AOL servers would be used to transmit his e-mails and thus, as discussed above, vested jurisdiction in Virginia courts.

For these reasons, we conclude that Code § 18.2-152.3:1 does not violate the dormant Commerce Clause.

III. CONCLUSION

In conclusion, we hold that the circuit court had jurisdiction over Jaynes. We also hold that Jaynes does not have standing to make a First Amendment overbreadth challenge to Code § 18.2-152.3:1. Finally, we hold that Jaynes' vagueness argument is without merit, and the statute does not violate the Commerce Clause. We will therefore affirm the judgment of the Court of Appeals upholding these convictions and sentences.

Affirmed.

SENIOR JUSTICE LACY, with whom JUSTICE KOONTZ and JUSTICE LEMONS join, dissenting.

I concur in the majority's conclusions on the issues of jurisdiction, vagueness and the Commerce Clause. However, I cannot join the majority's decision that Jaynes does not have standing to raise a First Amendment claim that Code § 18.2-152.3:1 is unconstitutionally overbroad. As discussed below, I firmly believe that the policy reflected in other cases of this Court and virtually all other state and federal courts allowing litigants under very limited circumstances to raise constitutional challenges to

statutes alleged to unconstitutionally burden the First Amendment right of free speech of third parties is the correct policy. Furthermore, by rejecting this exception to the standing rule, the majority sends those litigants who raise an overbreadth challenge to statutes of this Commonwealth to the federal judicial system to construe such Virginia statutes and determine whether they are constitutional. I believe that the courts of this Commonwealth, not the federal courts, have the primary responsibility to consider and construe the statutes of this Commonwealth.

A. *Standing*

The majority opinion clearly and correctly recites that, as a general rule, a litigant has standing to sue only to vindicate those rights possessed by the litigant. The reasons for this standing requirement reflect important policy considerations including the principle that courts should not issue advisory opinions on factual situations not before it. *See e.g., Commonwealth v. Harley,* 256 Va. 216, 219-20, 504 S.E.2d 852, 854 (1998) (courts not constituted to render advisory opinions). The majority also identifies a limited exception to this rule that is made in one isolated but significant area. The exception allows a litigant to challenge a statute as overbroad in violation of rights protected by the First Amendment to the United States Constitution even if the challenger engaged in activity that is not entitled to constitutional protection. The United States

Supreme Court has often expressed the reason for allowing this exception:

> This "exception to the usual rules governing standing," *Dombrowski v. Pfister,* 380 U.S. [479,] 486 [(1945)], reflects the transcendent value to all society of constitutionally protected expression. We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button,* 371 U.S. [415,] 433 [(1963)].

Bigelow v. Virginia, 421 U.S. 809, 816 (1975) ("*Bigelow II*").

> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citations omitted).

This standing exception, however, is not without limits. When this exception is applied, enforcement of the offending statute will be invalidated only in instances in which the statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 118-19 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)). Furthermore, courts are instructed to apply a limiting construction or partial invalidation to the statute if available in order to remove the constitutionally offending application and avoid the invalidating enforcement of the entire statute. *See Virginia v. Hicks,* 539 U.S. at 119 (quoting *Broadrick,* 413 U.S. at 613). These limitations prevent widespread misuse of the exception and provide a realistic balance between the policies underlying general principles of standing and the policies supporting the exception to standing.

In my opinion the rationale for the exception to the normal rule of standing is as valid today as it was when first adopted in 1940. *See Thornhill v. Alabama,* 310 U.S. 88, 96-100 (1940). Indeed, it may be even more relevant in this era of communication through the Internet. The current use of the Internet as the marketplace for expressing political ideas, views and positions emphasizes the need for insuring that use of this medium not be chilled by the threat of criminal prosecution. Those persons wishing to use this medium should have the same ability to express

their views anonymously as did Thomas Paine during the founding of our country.

The majority's decision is especially problematic when viewed in the context of our cases that have acknowledged that persons engaged in unprotected activity could raise an overbreadth challenge to statutes of this Commonwealth in the courts of this Commonwealth, even if such challenges were not dispositive or successful in the case. *See Esper Bonding Co. v. Commonwealth,* 222 Va. 595, 283 S.E.2d 185 (1981), *Pedersen v. City of Richmond,* 219 Va. 1061, 254 S.E.2d 95 (1979), *Stanley v. City of Norfolk,* 218 Va. 504, 237 S.E.2d 799 (1977), *Owens v. Commonwealth,* 211 Va. 633, 179 S.E.2d 477 (1971). The majority concludes that these cases have no precedential value because they did not involve litigants engaged in commercial speech, and although the cases acknowledged the existence of the standing exception, the defendants did not prevail on that basis.

In contrast, the majority vests precedential value in the 1974 case of *Wayside Restaurant, Inc. v. City of Virginia Beach,* 215 Va. 231, 208 S.E.2d 51 (1974), asserting that in that case this Court refused to allow standing to a defendant engaged in commercial conduct (topless dancing in a restaurant) to raise the "hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment." *Id.* at 235, 208 S.E.2d at 54. Observing that no subsequent case of this Court has addressed *Wayside Restaurant,* the majority,

without determining the extent of the case's precedential value, concludes that "Virginia does not accord standing to a person, such as Jaynes, whose actions involve only otherwise unprotected commercial speech, to assert the First Amendment rights of those who engage in noncommercial speech." It is on the basis of this "standing rule" drawing a distinction between unprotected commercial and noncommercial speech, that the majority builds its case for denying Jaynes standing here. Not only do I reject this distinction as a legitimate basis for discriminating in the application of the standing exception, *infra,* the historical context of *Wayside Restaurant* and the opinion itself, in my view, do not create the "standing rule" and "apparent" precedential value found by the majority.

As the majority acknowledges, *Wayside Restaurant* was decided while *Bigelow II,* was pending in the United States Supreme Court. The defendant in that case, a publisher of an advertisement for a doctor who performed abortions, sought to use the exception to the standing rule to assert a First Amendment overbreadth challenge to the statute. When that case was before this Court, the Attorney General argued that the defendant "lacks standing to assert the hypothetical rights of others." *Bigelow v. Commonwealth,* 213 Va. 191, 197, 191 S.E.2d 173, 177 (1972) ("*Bigelow I*"). The defendant and the dissent asserted that the requisite standing existed, relying upon a previous case of the Court in which the Court stated that "where First

Amendment liberties are involved, persons who engage in non-privileged conduct are not precluded from attacking a statute under which they were convicted." *Owens,* 211 Va. at 638-39, 179 S.E.2d at 481. The United States Supreme Court reversed this Court after *Wayside Restaurant* was decided, noting that this Court had recognized the exception to the standing rule when a litigant was asserting the First Amendment rights of third parties. *Bigelow II,* 421 U.S. at 816. Although the standing exception was not dispositive in *Bigelow II* because the General Assembly had amended the statute under constitutional attack, after the Supreme Court's decision in *Bigelow II* no Virginia case has questioned directly or indirectly the applicability of the standing exception in Virginia.

The Court's most recent, and perhaps the most compelling, recognition of the standing exception occurred in *Commonwealth v. Hicks,* 264 Va. 48, 563 S.E.2d 674 (2002) ("*Hicks I*"). In that case the majority applied the United States Supreme Court's exception to the standing rule reciting that "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." *Id.* at 55, 563 S.E.2d at 678. The dissent in *Hicks I,* although concluding that the majority failed to consider whether the policy's overbreadth was sufficiently substantial, nevertheless, did not question the legitimacy of the

standing exception, the exception which the majority abandons in this case. *Id.* at 64, 563 S.E.2d at 683 (Kinser, J., concurring in part and dissenting in part). If principles of precedent and stare decisis are to be applied, in my opinion, the unbroken recognition and application of the standing exception outweighs and belies a rule "established" in 1974 based on the dichotomy of commercial and non-commercial speech.

Furthermore, my reading of *Wayside Restaurant* does not lead me to the conclusion that the clear rule advocated by the majority was established in that case. Consider the critical part of the Court's opinion in *Wayside Restaurant* upon which the majority relies:

> The appellants advance a number of arguments that the ordinance is overbroad, *i.e.*, that it would proscribe the wearing of many types of socially acceptable wearing apparel and beach wear, and that dancing, as a form of expression, is speech protected by the First Amendment. The rule is that where, as here, a line can be clearly drawn between commercial and noncommercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment.

Wayside Restaurant, 215 Va. at 234-35, 208 S.E.2d at 54. Nothing in this passage indicates that the Court

considered the third party rights asserted by restaurant owners as First Amendment rights. The Court did not cite *Bigelow I* as authority for the proposition so clearly stated by the Court in that case only two years earlier and which, at that time, was still the prevailing law on the issue. Furthermore, although the defendant restaurant companies asserted that topless dancing was a form of speech, the Court did not treat the activity as speech but only commercial conduct, stating that "[n]o evidence was presented which establishes that we are dealing with more than mere conduct, which is a fit subject of regulation under the police power, as opposed to a mixture of conduct and speech." *Id.* at 236, 208 S.E.2d at 55. Accordingly, I do not view *Wayside Restaurant* as creating a "standing rule" precluding persons who engage in commercial activity from asserting the First Amendment rights of third parties when those rights are burdened by a constitutionally overbroad statute.

Finally, when the Court in *Wayside Restaurant* drew a distinction between commercial and non-commercial speech, the law was unsettled regarding whether commercial speech was entitled to any constitutional protection. Indeed, in another Virginia case decided by the United States Supreme Court one year after *Bigelow I, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1975), the Commonwealth argued, as it had in *Bigelow I and II,* that commercial speech was outside the protection of the First Amendment. The

Supreme Court acknowledged that past decisions gave "some indication that commercial speech is unprotected," citing *Breard v. Alexandria,* 341 U.S. 622 (1951), as an example. *Virginia State Board of Pharmacy,* 425 U.S. at 758. The Court however, noted that by the time *Bigelow II* was issued, "the notion of unprotected 'commercial speech' all but passed from the scene," and clearly held that commercial speech was entitled to protection under the First Amendment. 425 U.S. at 759, 770. *Breard,* the case cited by the United States Supreme Court as a case indicating that commercial speech was not entitled to any constitutional protection, was the same case cited by the Court in Wayside Restaurant in connection with the distinction between commercial and non-commercial speech. *Wayside Restaurant,* 215 Va. at 235, 208 S.E.2d at 54.

For these reasons I do not accord *Wayside Restaurant* the "apparent" precedential value given it by the majority, nor do I read the case as establishing a rule which has not been altered limiting the previously recognized exception to the standing rule in commercial speech cases. Rather, in my opinion, a fair reading of the cases of this Court supports the conclusion that the exception to the standing rule was recognized and applied as late as 2002 by this Court without any preclusion of litigants involved in commercial speech or conduct.

The majority does not base its new standing rule solely on the "standing rule" of *Wayside Restaurant.* The majority, relying on the phrase in *Virginia v.*

Hicks that the states are free to decide for themselves whether they want to recognize the standing exception, 539 U.S. at 120, concludes that our prior recognition of the exception was done under the mistaken belief that states had to recognize the standing exception adopted in the federal system. According to the majority, now freed from that mistaken belief, this Court is free to reexamine our position and, as a matter of policy, should no longer allow such exception. Again I disagree.

First, the statement by the Supreme Court in *Virginia v. Hicks* that states were not bound by the federal rules of standing, *id.*, is not a pronouncement of new law; it is nothing more than a statement of an obvious long standing principle. *See ASARCO, Inc. v. Kadish,* 490 U.S. 605, 617 (1989) (the standing requirements of federal courts do not apply to state courts, even when the state courts consider federal law). *City of Los Angeles v. Lyons,* 461 U.S. 95, 113 (1983) ("[S]tate courts need not impose the same standing or remedial requirements that govern federal[ ] court proceedings.") Of course, this Court can always change its mind, as the majority has done here. But such changes, in my opinion, should be made only after studied consideration of competing policies and the implications of the proposed change.

The primary reason for the new standing policy, as expressed by the majority, is its belief that a litigant who engages in "unprotected" commercial speech should not be able to secure a "get out of jail free" card. While this may be an admirable policy as

it relates to the litigant, there is no indication that the majority weighed its rationale or new policy against the danger or harm to society imposed by the overbroad statute. Thus, I can only surmise that the majority found those societal dangers of less importance and concluded that federal courts are a better or an acceptable venue for construing the constitutionality of Virginia statutes challenged on the basis of overbreadth.

Furthermore, although the majority seems to deny standing to only one class of litigants – purveyors of deceptive commercial speech – this decision will, in my opinion, result in the complete eradication of the standing exception. Indeed, the majority specifically defines the defendant's activity as *unprotected* speech.[17] Indeed, by definition the exception to the standing rule is only needed because

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[17] I do not agree with the majority's conclusion that Jaynes' commercial speech was "unprotected" because the routing information was false. Commercial speech is afforded constitutional protection based on the informational function of advertising. When such information does not accurately inform the public about lawful activity, it is not entitled to constitutional protection and may be banned. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563-64 (1980). The routing information at issue here, while false, is not part of the commercial speech aimed at the recipient of the e-mail and indeed, if appearing on the e-mail at all, is likely not to be even noticed by the recipient. It is not, in my opinion, inaccurate information about a lawful activity that is not entitled to constitutional protection as commercial speech.

the challenger seeking to raise the First Amendment rights of third parties is *not* engaged in protected speech or conduct. In all the cases of this Court, which the majority considers of no precedential value or irrelevant to the instant case because they did not involve commercial activity, the litigant was involved in unprotected activity.

Because the rationale for the standing exception requires that one engaged in unprotected speech be allowed to raise the rights of those engaged in protected speech, I can find no principled basis for discriminating between the types of unprotected activity for purposes of applying the standing exception. Indeed, in light of the Court's decision today, it is difficult to imagine how this Court could, in the future, find a rational basis to allow a litigant engaged in unprotected speech or conduct to challenge a statute as unconstitutionally overbroad utilizing the standing exception. I can imagine no persuasive rationale for a policy that suggests a litigant engaged in unprotected commercial speech cannot qualify for the standing exception because that individual should not receive a "get out of jail free" card, but that a litigant engaging in any other unprotected activity could qualify for the exception. Consequently, although the majority may believe today's decision affects a limited number of defendants, in my opinion, the rationale underlying the majority's new classification will effectively eliminate the exception to the standing rule in all cases. As a result of this decision, those who wish to

distribute their political views anonymously via the Internet must do so do under the threat of criminal prosecution and those who seek to challenge this statute or similar constitutionally suspect statutes must turn to the federal courts.

Because I would continue this Court's prior policy of recognizing the exception to the standing rule, I would allow Jaynes to pursue his First Amendment claim that Code § 18.2-152.3:1 is overbroad. In considering Jaynes' First Amendment challenge, I conclude for the following reasons that the statute is unconstitutionally overbroad and therefore would reverse the judgment of the Court of Appeals and dismiss the charges against Jaynes.

B. *Constitutionality of Code § 18.2-152.3:1*

As shown by the record, because e-mail transmission protocol requires entry of an IP address and domain name for the sender, the only way such a speaker can publish an anonymous e-mail is to enter a false IP address or domain name. Therefore, like the registration record on file in the mayor's office identifying persons who chose to canvass private neighborhoods in *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), registered IP addresses and domain names discoverable through searchable data bases and registration documents "necessarily result [ ] in a surrender of [the speaker's] anonymity." *Id.* at 166. The right to engage in anonymous speech, particularly anonymous political

speech, is "an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342 (1995). By prohibiting false routing information in the dissemination of e-mails, Code § 18.2-152.3:1 infringes on that protected right. The Supreme Court has characterized regulations prohibiting such anonymous speech as "a direct regulation of the content of speech." *Id.* at 345.

State statutes that burden "core political speech," as this statute does, are presumptively invalid and subject to a strict scrutiny test. *Id.* at 347. Under that test a statute will be deemed constitutional only if it is narrowly drawn to further a compelling state interest. *Id.* In applying this test, we must also consider that state statutes are presumed constitutional, *City Council v. Newsome,* 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984), and any reasonable doubt regarding constitutionality must be resolved in favor of validity, *In re Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003).

There is no dispute that the statute was passed to control the transmission of unsolicited commercial bulk e-mail, generally referred to as SPAM. In enacting the federal CAN-SPAM Act, Congress stated that commercial bulk e-mail threatened the efficiency and convenience of e-mail. 15 U.S.C. § 7701(a)(2). Many other states have regulated unsolicited bulk e-mail but have restricted such regulation to commercial e-mails. *See e.g.*, Ariz. Rev. Stat. § 44-1372.01; Ark. Code Ann. § 4-88-603; Cal. Bus. &

Prof. Code § 17538.45; Fla. Stat. § 668.603; Idaho Code § 48-603E; Ill. Comp. Stat., tit. 815 § 511/10; Ind. Code § 24-5-22-7; Kan. Stat. Ann. § 50-6, Md. Code Ann., Commercial Law § 14-3002. There is nothing in the record or arguments of the parties, however, suggesting that unsolicited non-commercial bulk e-mails were the target of SPAM filters, caused increased costs to the Internet service providers, or were otherwise a focus of the problem sought to be addressed by the Virginia legislation that became Code § 18.2-152.3:1.

Jaynes does not contest the state's interest in controlling unsolicited commercial bulk e-mail as well as fraudulent or otherwise illegal e-mail. Nevertheless, Code § 18.2-152.3:1 is not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected speech such as pornography or defamation speech. Therefore, the legislation is not narrowly tailored to protect the compelling interests advanced.

C. *Substantial Overbreadth*

The Commonwealth argues that enforcement of Code § 18.2-152.3:1 should not be precluded because, even if unconstitutionally overbroad, that remedy is limited to those statutes that are substantially overbroad. The concept of substantial overbreadth is not a test of the constitutionality of a statute, but a policy related to the remedy flowing from a successful

facial challenge. A successful facial overbreadth challenge precludes the application of that statute in all circumstances. Recognizing the sweep of this remedy, the United States Supreme Court has stated that it will not impose such an expansive remedy where the chilling effect of an overbroad statute on constitutionally protected rights cannot justify prohibiting all enforcement of the law. "For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech. . . . " *Virginia v. Hicks,* 539 U.S. at 119. Thus a statute should be declared facially overbroad and unconstitutional only if the statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 118-19 (citing *Broadrick,* 413 U.S. at 615).

The Commonwealth argues that Code § 18.2-152.3:1 is not substantially overbroad because it does not impose any restrictions on the content of the e-mail and "most" applications of its provisions would be constitutional, citing its application to unsolicited bulk commercial e-mail, unsolicited bulk e-mail that proposes a criminal transaction, and unsolicited bulk e-mail that is defamatory or contains obscene images. According to the Commonwealth an "imagine[d] hypothetical situation where the Act might be unconstitutional as applied does not render the Act substantially overbroad." Prohibiting all anonymous political, religious, or other expressive speech as Jaynes asserts is not an insignificant

"hypothetical situation." I reject the Commonwealth's argument that Jaynes' facial challenge to Code § 18.2-152.3:1 must fail because the statute is not "substantially overbroad."

D. *Narrowing Construction*

Our jurisprudence requires us to interpret a statute to avoid a constitutional infirmity. *Burns v. Warden,* 268 Va. 1, 2, 597 S.E.2d 195, 196 (2004). Nevertheless, construing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. *Virginia Soc'y for Human Life v. Caldwell,* 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998). A statute cannot be rewritten to bring it within constitutional requirements. *Reno v. ACLU,* 521 U.S. 844, 884-85 & nn.49-50 (1997); *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 397 (1988).

According to the Commonwealth, Code § 18.2-152.3:1 could avoid constitutional infirmity through a declaration that the statute does not apply to "unsolicited bulk non-commercial e-mail that does not involve criminal activity, defamation or obscene materials." Alternatively the Commonwealth suggests that the statute be construed to apply only in instances where the receiving Internet service provider "actually objects to the bulk e-mail."

The construction urged by the Commonwealth is not a reasonable construction of the statute. Nothing in the statute suggests the limited applications

advanced by the Commonwealth. The Commonwealth's suggested construction requires rewriting Code § 18.2-152.3:1. That task is one for the General Assembly, not the courts.

E. *Trespass*

The Commonwealth also argues that Code § 18.2-152.3:1 is like a trespass statute, prohibiting trespassing on the privately owned e-mail servers through the intentional use of false information and that no First Amendment protection is afforded under these circumstances. I disagree.

Trespass is the unauthorized use of or entry onto another's property. *See e.g., Vines v. Branch,* 244 Va. 185, 190, 418 S.E.2d 890, 894 (1992) ("Where a person has illegally seized the personal property of another and converted it to his own use, the owner may bring an action in *trespass,* trover, detinue, or assumpsit."); Code § 18.2-119, -125, -128, -132.

Code § 18.2-152.3:1 does not prohibit the *unauthorized* use of privately owned e-mail servers. It only prohibits the intentional use of false routing information in connection with sending certain e-mail through such servers. Thus, even if an e-mail service provider specifically allowed persons using false IP addresses and domain names to use its server, the sender could be prosecuted under the statute although there was no unauthorized use or trespass. Therefore, Code § 18.2-152.3:1 is not a trespass statute.

The Commonwealth's argument that there is no First Amendment right to use false identification to gain access to private property is inapposite. First, in making this argument the Commonwealth uses the terms "false" and "fraudulent" interchangeably. Those concepts are not synonymous.[18] At issue here is the statute's prohibition of "false" routing information. Second, the cases upon which the Commonwealth relies are civil cases between Internet service providers and the entities engaged in sending commercial unsolicited bulk e-mails: *America Online, Inc. v. IMS,* 24 F.Supp.2d 548 (E.D. Va. 1998), *CompuServe, Inc. v. Cyber Promotions, Inc.,* 962 F.Supp. 1015 (S.D. Ohio 1997), and *Cyber Promotions, Inc. v. American Online, Inc.,* 948 F.Supp. 436 (E.D. Pa. 1996). In litigation between these private parties, the courts have held that the unauthorized use of the Internet service providers' property constituted common law trespass and that a First Amendment claim could not be raised against the owner of private property. These cases have no relevance here because this is not a trespass action by a private property owner and the First Amendment right is not being asserted against the owner of private property, but against government action impacting the claimed First Amendment right.

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[18] Fraud is a knowing misrepresentation made to induce another to act to his detriment. *Klaiber v. Freemason Assocs.,* 266 Va. 478, 485, 587 S.E.2d 555, 558 (2003).

F. *Conclusion*

For the reasons stated, I would find Code § 18.2-152.3:1 unconstitutionally overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment to the United States Constitution. I would therefore reverse the judgment of the Court of Appeals and vacate Jaynes' convictions of violations of Code § 18.2-152.3:1.

COURT OF APPEALS OF VIRGINIA

Present: Judge Haley, Senior Judges Bumgardner and Fitzpatrick*
Argued at Alexandria, Virginia

JEREMY JAYNES

v. Record No. 1054-05-4

COMMONWEALTH OF VIRGINIA

OPINION BY JUDGE JAMES W. HALEY, JR. SEPTEMBER 5, 2006

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY
Thomas D. Horne, Judge

Thomas M. Wolf (John H. Craddock, Jr.; Joseph M. Rainsbury; David A. Oblon; LeClair Ryan, P.C.; Albo & Oblon, L.L.P., on briefs), for appellant.

William E. Thro, State Solicitor General (Judith Williams Jagdmann, Attorney General; Eric A. Gregory, Associate State Solicitor General; Courtney M. Malveaux, Associate State Solicitor General; D. Mathias Roussy, Associate State Solicitor General; William R. Sievers, Associate State Solicitor General; Richard B. Campbell, Deputy Attorney General; Lisa M. Hicks-Thomas, Senior Assistant Attorney General; Samuel

* Judge Fitzpatrick participated in the hearing and decision of this case prior to the effective date of her retirement on March 31, 2006, and thereafter by designation pursuant to Code § 17.1-400(D).

E. Fishel, IV, Assistant Attorney General, on brief), for appellee.

Amicus Curiae: The Rutherford Institute (John W. Whitehead; L. Ilaine Upton, on brief), for appellant.

Amicus Curiae: American Civil Liberties Union of Virginia, Inc. (Rebecca K. Glenberg, on brief), for appellant.

Amicus Curiae: United States Internet Service Provider Association (Jennifer C. Archie; Richard P. Bress; Courtney S. Schorr; Alexander Maltas; Latham & Watkins, on brief), for appellee.

Jeremy Jaynes (appellant) appeals his conviction by jury of three counts of violating Code § 18.2-152.3:1, the unsolicited bulk electronic mail provisions of the Virginia Computer Crimes Act ("VCCA"). He maintains that (1) the trial court lacked subject matter jurisdiction over this case; (2) the statute violates the First Amendment; (3) the statute violates the Dormant Commerce Clause; and (4) the statute is unconstitutionally vague. We find no merit to these claims and affirm.

I.

THE STATUTE AND PROCEDURAL BACKGROUND

The VCCA, Code §§ 18.2-152.1 to 18.2-152.13, notably, is part of Chapter 5 of the Virginia Criminal Code, entitled "Crimes Against Property."

The sections of the VCCA here relevant read as follows:

§ 18.2-152.3:1.

A. Any person who:

1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider of its subscribers;

* * *

B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:

1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period . . . .

In a motion to dismiss before the trial; in a motion to strike after the prosecution rested; and in a renewed motion to strike after appellant rested his case, appellant objected that the court lacked jurisdiction and that the law was unconstitutional under the First Amendment; was unconstitutionally vague; and violates the Dormant Commerce Clause of

the Constitution. The trial court denied each motion.[1] Following conviction and in accordance with the decision of the jury, the trial court sentenced appellant to nine years in prison. This appeal followed.

II.

THE OPERATION OF ELECTRONIC-MAIL

The sending of e-mail is governed by Simple Mail Transfer Protocol ("SMTP"), a set of standards to facilitate the transfer of e-mail. SMTP specifies that a computer sending an e-mail must contain information identifying the sender, generally referred to as "hello domain" information, as well as certain recipient information. The hello domain, in turn, contains the internet protocol ("IP") address and domain name of the sending party. IP addresses are unique strings of numbers; each computer accessing the Internet is generally assigned one. For convenience and efficiency, IP addresses of many computers are given textual equivalents known as "domain names." For example, a search known as a "whois" search reveals that the domain name "www.aol.com" is owned by America Online, Inc. ("AOL"), which is located in Dulles, Virginia. Additional contact information is provided as well. The IP addresses of four servers

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[1] While appellant presented other challenges at trial as to proof of venue and the sufficiency of the evidence, those issues are not before this Court.

associated with aol.com are also available because "www.aol.com" is the domain name associated with those IP numbers.

When e-mail is sent, the hello domain and sender information exist as part of the transmission information of the e-mail. E-mail servers and routers starting with the sender's Internet Service Provider ("ISP")[2] relay the message forward until it reaches the e-mail servers of the recipient's ISP, which then direct the e-mail to the intended recipient. These server interactions include the presentation of the sending e-mail's hello domain. Essentially, the sending computer identifies itself and presents the hello domain of the e-mail.

Each time the message passes through a different server, a record of that transaction is added to the routing information. Thus, using the e-mail's routing information, one can retrace the exact servers it went through to reach its destination, as if each post office or mail sorting facility added its own postmark to a letter. Furthermore, a server along this chain could choose to block the message from going further. The sender, however, has no way to control or predict the pathway his message will take to arrive at its destination. In fact, the message can be broken up and sent in pieces through multiple unique pathways.

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[2] Internet users can obtain e-mail service from a different entity than their ISP. For simplicity here, however, we use the term ISP to refer to e-mail service providers as well.

Despite this inherent unpredictability, the last server through which the message passes before reaching the recipient is his ISP's server, in this case, AOL's e-mail servers.

One major complaint of e-mail users is the volume of unsolicited bulk e-mail (often called "spam") they receive on a daily basis. To increase subscriber satisfaction and to protect their networks from computer viruses and other problems, ISPs employ a number of tactics to block spam from reaching users. One major tactic is to identify domain names or IP addresses that have sent unwanted e-mail in the past and to automatically prevent the delivery of any messages coming from those senders. Another related tactic is to identify senders of large numbers of messages to verify their legitimacy. Thus, an ISP can learn which companies sending high volumes of e-mail are potentially fraudulent or unwanted.

People sending spam ("spammers"), then, respond by masking their true identities to evade the protective measures. They create false routing information or transmission information, making messages appear as if they come from hundreds or thousands of different domain names and IP addresses. Thus, spammers can ensure that the ISP cannot detect and block every e mail they send and can evade detection because the thousands of messages appear to come from hundreds of different sources.

III.

FACTS

The facts in this case are generally undisputed.

Appellant used computers in his home in North Carolina to send over ten thousand e-mails, on each of three different days, to subscribers of AOL, an ISP that provides e-mail accounts as part of its service. That AOL's servers are located in Loudoun County, Virginia, is not challenged.

On July 16, 2003, appellant sent 12,197 pieces of unsolicited bulk e-mail with falsified routing and transmission information onto AOL's proprietary network. On July 19, he sent another 24,172 similarly falsified e-mails, and he followed on July 26 with an additional 19,104. Each message targeted an AOL subscriber. That the sender knew each proposed recipient was an AOL subscriber was clear because the e-mail addresses of all recipients ended in "@aol.com." The messages advertised one of three products: either a FedEx claims product, a stock picker, or a "history eraser." To purchase one of these products, potential buyers would "click" on a hyperlink within the e-mail which redirected them to a website. Notably, this redirection led to thousands of different websites, rather than a single one, to consummate the purchase.

Among those items seized during a search of appellant's home were compact discs (CDs) containing

both user names and full e-mail addresses.[3] The CDs contained at least 176 million full e-mail addresses and over 1.3 billion user names. Appellant also possessed a DVD containing not only AOL e-mail addresses, but also other personal and private account information for millions of AOL users. Finally, police collected multiple "zip discs" (another type of data storage device) containing 107 million AOL e-mail addresses. All of the AOL user names, e-mail addresses, and account information were stolen and illegally in appellant's possession.

In this case, appellant employed exactly those spammer tactics outlined in Part II, *supra,* of this opinion. He used thousands of different IP addresses and hello domains to send tens of thousands of e-mails and avoid detection by AOL's network. Each e-mail advertised a commercial product; none contained any content that was personal, political, religious, or otherwise non-commercial. To aid his deception, appellant registered numerous different domain names using false contact information through Network Solutions, whose offices are located in Virginia. The contracts between appellant and Network Solutions require that appellant provide accurate contact information, update contact information when it changes, and submit to

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[3] The user name is generally that portion of an e-mail address appearing before the "@" symbol.

jurisdiction in Virginia for resolution of any contract disputes between appellant and Network Solutions.

IV.

JURISDICTION

Appellant contends that the trial court lacked jurisdiction because he could not control the pathways his messages took. Numerous servers and routers handled his messages before arriving at the recipient's mailbox. Since any one of these intervening servers could have blocked his e-mails or since he could not specify which servers his messages went through, appellant argues, charging him with a crime in the jurisdiction of one of those servers is inappropriate. We disagree.

Circuit courts in Virginia have exclusive original jurisdiction over all felony indictments "for offenses committed within their respective circuits." Code § 19.2-239; *see also* Code § 17.1-513. The Supreme Court of Virginia has said "a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit." *Travelers Health Ass'n v. Commonwealth,* 188 Va. 877, 892, 51 S.E.2d 263, 269 (1949), *aff'd,* 339 U.S. 643 (1950). Furthermore, "[j]urisdiction may exist where the immediate harm occurs, even if the criminal act does not physically occur there." *Foster-Zahid v. Commonwealth,* 23 Va. App. 430, 441, 477 S.E.2d 759, 764 (1996).

In *Travelers Health,* the Virginia State Corporation Commission ordered the defendant to stop its solicitations of business by mail until it complied with the Blue Sky Law. The Court held that selling securities by mail in the Commonwealth while not in compliance with the statute was sufficient to give the corporation commission jurisdiction. 188 Va. at 892, 51 S.E.2d at 269. Thus, criminal jurisdiction could lie in the state where the mail was received. Similarly, here, criminal jurisdiction may lie where AOL's servers are located because it is the trespass upon those servers that constitutes the offense.

We also find that appellant's actions in sending the e-mails to AOL subscribers are sufficiently direct that *Moreno v. Baskerville,* 249 Va. 16, 452 S.E.2d 653 (1995), on which appellant relies, does not apply. In *Moreno,* the defendant sold drugs in Arizona knowing that the buyer intended to take them to Virginia for resale but was not himself involved in that resale. In ruling that the trial court lacked jurisdiction, the Supreme Court noted that the buyer could have chosen to resell the drugs in another state besides Virginia and that the defendant would have had no control over that decision. *Id.* at 19, 452 S.E.2d at 655. Thus, the actions of the buyer served to intervene and end any criminal liability Moreno might have had for the distribution of the drugs in Virginia.

Appellant argues this situation is akin to *Moreno* because intervening acts of the servers and routers were what caused the e-mails to pass through

Virginia. That is, the arrival of the e-mails at AOL's servers in Loudoun County was the result of any number of computer processes, over which appellant had no control, similar to the lack of control Moreno had over the drugs once he sold them in Arizona. We find no merit to this comparison.

All e-mails in question in this case were addressed to AOL users, meaning that to arrive at the destination intended by appellant, the messages *necessarily* had to pass through AOL's e-mail servers, all of which are in the jurisdiction of the trial court. As one federal court noted, "e-mail transmitted to an ISP subscriber is processed and stored on the ISP's e-mail computer servers. The e-mail server is located in a discrete geographic location." *Verizon Online Servs., Inc. v. Ralsky,* 203 F. Supp. 2d 601, 606 (E.D. Va. 2002). And, "once the e-mail is transmitted, it must first pass through the ISP's computer server to reach its ultimate destination – the subscriber's computer." *Id.* Thus, while the e-mails could have taken any number of pathways to reach the intended recipients, each pathway ended at AOL's servers.

Furthermore, the mere fact that delivery could have failed is insufficient to eliminate liability when delivery did not fail. Analogously, a person can be charged with a criminal act committed by mail even though a number of people might handle that mail during the course of its delivery. An appellant cannot claim that a court lacks jurisdiction simply because any number of intervening actions could have disrupted the criminal enterprise, but did not.

In *Moreno,* the buyer could have taken the drugs from the seller in Arizona, and sold the drugs anywhere, without input from or change in position by the defendant seller. Here, appellant's e-mail solicitations would have been successful only if his messages arrived at their intended destinations, which required that they pass through AOL's servers in Virginia.

Finally, we note that, with respect to intent, appellant cannot challenge that he purposely intended his e-mails to pass through AOL's servers because the address of every intended recipient in this case ends in "@aol.com." Necessarily, if the e-mail is transmitted to the intended recipient, it must pass through AOL's servers.

Accordingly, we hold that the circuit court of Loudoun County, Virginia, properly had criminal jurisdiction to try appellant.

V.

THE FIRST AMENDMENT

Appellant argues that the trial court erred in ruling that the VCCA does not violate the First Amendment. Specifically, he contends that the law is overbroad because its language prohibits anonymous speech of a non-commercial nature and that the First Amendment protects such speech. We hold that the law does not violate the First Amendment and affirm the trial court's ruling on this point.

A.

Standard of Review

We review arguments regarding the constitutionality of a statute *de novo*. *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (citing *Wilby v. Gostel*, 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003); *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002)), *cert. denied*, 126 S. Ct. 626 (2005). Furthermore,

> We are guided by the established principle that all acts of the General Assembly are presumed to be constitutional. In applying this principle, we are required to resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity. . . . [W]e will declare a statute null and void only when it is plainly repugnant to a state or federal constitutional provision.

In re Phillips, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003) (internal citations omitted).

Appellant seeks to challenge the validity of the VCCA on its face. In normal contexts, one may challenge the constitutionality of a statute only as applied to him. *See, e.g., County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979). However, facial challenges are sometimes allowed when an appellant claims First Amendment protections.

As the Supreme Court recently said, "The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges." *Virginia v. Hicks,* 539 U.S. 113, 118 (2003).

The Supreme Court in *Hicks* described the overbreadth doctrine in depth.

> The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973), suffices to invalidate *all* enforcement of that law. . . .
>
> [The Supreme Court has] provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech–especially when the overbroad statute imposes criminal sanctions. . . .
>
> [H]owever, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." [*Broadrick*], 413 U.S. at 615. For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to

> constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law overbroad, we have insisted that a law's application to protected speech be substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the strong medicine of overbreadth invalidation.

Id. at 118-20 (emphasis in original) (internal quotations and citations omitted except when appearing within quotation).[4]

Thus, a law is unconstitutionally overbroad under the First Amendment when it prohibits a substantial amount of protected speech, either absolutely or as compared to the unprotected conduct also encompassed by the statute.

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[4] In *Hicks,* the Court further held that state law governs whether a party has standing to assert in state court a facial challenge under the First Amendment. "Whether Virginia's courts should have entertained this overbreadth challenge is entirely a matter of state law." *Id.* at 120. Since *Hicks,* no Virginia appellate court has addressed whether Virginia (as opposed to federal) law authorizes facial claims asserting overbreadth. *See Muhammad v. Commonwealth,* 269 Va. 451, 497, 619 S.E.2d 16, 42 (2005) (quoting *Hicks* but not addressing, in any detail, the appellant's facial overbreadth challenge to Virginia's anti-terrorism statutes because the appellant had "confin[ed] his argument to vagueness"), *cert. denied,* 126 S. Ct. 2035 (2006). We need not resolve the issue in this case, however, because of our holding that the claim fails on the merits in any event.

B.

The Relationship of Protected Speech and Code § 18.2-152.3:1

For a law to be unconstitutionally overbroad, it must proscribe a substantial amount of protected speech. Appellant contends that the sending of anonymous e-mails is protected by the First Amendment and that the VCCA proscribes the sending of anonymous e-mails. We take no position on the former contention because we disagree with the latter.

The right to speak anonymously has a long and respected history in First Amendment jurisprudence. In both *Talley v. California,* 362 U.S. 60 (1960), and *McIntyre v. Ohio Elections Comm's,* 514 U.S. 334 (1995), the Supreme Court struck down requirements that an author's name and address appear on handbills. Both decisions cite the history and power of anonymous or pseudonymous speech in America, noting the Federalist Papers as early examples.

In contrast to requiring that an author's name and address appear on a handbill, the VCCA requires only that the sender not intend "to falsify or forge electronic mail transmission information or other routing information" *in connection with sending spam through an e-mail service provider's network.* Code § 18.2-152.3:1(A)(1). That is, the statute criminalizes the intentional falsification of a sender's identity so as to gain access to a service provider's network. Thus, the statute does not prevent anonymous

speech, as appellant argues, but prohibits trespassing on private computer networks through intentional misrepresentation, an activity that merits no First Amendment protection.

Courts have consistently held that an e-mail service provider's computer network is private property and can be subject to trespassing. *See, e.g., Ralsky,* 203 F. Supp. 2d at 617 ("the sending of spam to and through an ISP's e-mail servers constitutes the tort of trespass to chattel in the state of Virginia"); *United States v. Gray,* 78 F. Supp. 2d 524, 532 (E.D. Va. 1999) ("[u]nauthorized access into a . . . computer is analogous to breaking and entering in the physical world"); *America Online v. LCGM,* 46 F. Supp. 2d 444, 452 (E.D. Va. 1998) ("transmission of electrical signals through a computer network is sufficiently 'physical' contact to constitute a trespass to property"); *America Online v. IMS,* 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (sending unauthorized spam constitutes trespass to chattels); *CompuServe Inc. v. Cyber Promotions,* 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (sending of electronic signals with a computer can support a trespass action).

Unauthorized spam can be a particularly harmful type of trespass to a computer network. Spam has been described as "one of the most popular forms of advertising over the Internet" and "the twenty first century version of junkmail." *Ralsky,* 203 F. Supp. 2d at 606. In 2003 in an attempt to address the harm caused by spamming, the United States Congress passed 15 USC §§ 7701 to 7713, commonly

known as the "CAN-SPAM Act." Spam now constitutes over half of all e-mail traffic, 15 USC § 7701(a)(2) (2003), and the Senate has found that spam will cost corporations over $113 billion by 2007. S. Rep. No. 108-102 (2003).

Courts have recognized the damage caused by spammers who trespass upon the private property of ISPs. In *CompuServe,* the court noted:

> High volumes of junk e-mail devour computer processing and storage capacity, slow down data transfer between computers over the Internet by congesting the electronic paths though which the messages travel, and cause recipients to spend time and money wading through messages that they do not want. It is ironic that if defendants were to prevail on their First Amendment arguments, the viability of electronic mail as an effective means of communication for the rest of society would be put at risk.

962 F. Supp. at 1028.

In *State v. Heckel,* 24 P.3d 404 (Wash. 2001), the Supreme Court of Washington wrote that:

> To handle the increased e-mail traffic attributable to deceptive spam, ISPs must invest in more computer equipment. Operational costs likewise increase as ISPs hire more customer service representatives to field spam complaints and more system administrators to detect accounts being used to send spam.

* * *

> The cost-shifting–from deceptive spammers to businesses and e-mail users–has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.

Id. at 409-10 (citations omitted).

The record in this case demonstrates the damage caused to AOL by spammers such as appellant. AOL employs 30 people on its spam response team and receives 7 to 10 million complaints each day regarding spam. Over 1 billion pieces of spam attempt to enter AOL's private network daily. Subscribers often cite spam as their reason for declining to continue using AOL as their ISP. AOL typically blocks 70-80% of the e-mail traffic that attempts to pass into its network because it comes from IP addresses that have a history of sending spam. Of the e-mails that enter the system, another 20-30% are filtered into subscribers' dedicated spam folders. As noted above, appellant purposely falsified his transmission data to evade AOL's attempts to protect its property interest in its servers and better serve its customers.

The protection of private property and the right to keep others off that property have long been recognized as a fundamental sphere of state regulation. Blackstone wrote,

> There is nothing which so generally strikes the imagination, and engages the affections

> of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

William Blackstone, 2 Commentaries *2.

The common law is not without principle or precedent to protect private property – as here codified in the VCCA – applicable to a technological world.

The Supreme Court has consistently recognized the constitutionality of laws prohibiting trespass. In *Martin v. Struthers,* 319 U.S. 141, 147 (1943), the Court said that "[t]raditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off." The Court considered free speech rights in public shopping malls in *Lloyd Corp. v. Tanner,* 407 U.S. 551, 568 (1972), and said, "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."

Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970), upheld the constitutionality of a law authorizing individuals to have their names removed from mass mailing lists and imposing penalties on organizations that failed to comply. The Court noted that to allow mailings to continue after a property owner has given notice that they must stop would

be "to license a form of trespass." *Id.* at 737. The opinion "reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another" and recognized that "the asserted right of a mailer . . . stops at the outer boundary of every person's domain." *Id.* at 738.

The Supreme Court of Virginia addressed an analogous conflict between property rights and free speech in *Hall v. Commonwealth,* 188 Va. 72, 49 S.E.2d 369 (1948). In *Hall,* the defendant was convicted of trespassing for distributing religious materials in an apartment building after the building management forbade him from doing so. The Court upheld his conviction after a lengthy discussion of the precedents, concluding that the rule prohibiting visitors within the building unless a tenant allows their entry "is valid and reasonable and does not infringe upon any right or privilege guaranteed the accused by the Constitution . . . . " *Id.* at 90, 49 S.E.2d at 378.

Appellant has conceded that he has no constitutional right to use AOL's servers to transmit his spam. Instead, he maintains that the statute prohibits anonymous or pseudonymous speech while not regulating other speech, meaning the VCCA is a content based restriction on speech and is thus subject to strict scrutiny. His reading of the statute ignores the requirement that the forgery be connected to "the transmission of unsolicited bulk e-mail through or into the computer network of an electronic

mail service provider or its subscribers." Code § 18.2-152.3:1(A)(1). The statute prohibits the falsification of the sender's routing and transmission information to gain access to a computer network that would otherwise be inaccessible. In short, the statute prohibits lying to commit a trespass.

As *Rowan* and *Hall* clearly establish, the First Amendment does not prohibit a property owner from protecting his property from a trespass. As the homeowner in *Rowan* could stop the flow of unwanted junk mail into his home, now, an ISP can prevent the entry of spam into its network. While the method of delivery has changed, the underlying rights of the parties remain the same. The First Amendment gives no one the right to trespass on the property of another. And if the Commonwealth can criminalize the trespass, then certainly it can criminalize falsification to facilitate it.

As the statute in question here regards trespassing, not speech, appellant's reliance on *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997), is misplaced. *Miller* concerned a Georgia statute that, in part, prohibited using an "'individual name . . . to falsely identify the person'" in connection with sending an e-mail. *Id.* at 1230 (quoting Ga. Code Ann. § 16-9-93.1 (2006)) (omission in original). Unlike the VCCA provisions at issue here, Georgia's statute directly prohibited using a pseudonym in clear violation of established First Amendment jurisprudence, and the district court enjoined enforcement of the law. Because Virginia's statute

addresses trespassing rather than the use of a pseudonym, *Miller* is not relevant to this case.

The First Amendment argument appellant presents is not relevant. The VCCA proscribes no speech. Rather, the statute proscribes intentional falsity as a machination to make massive, uncompensated use of the private property of an ISP. Therefore, the statute cannot be overbroad because no protected speech whatsoever falls within its purview.[5]

VI.

THE DORMANT COMMERCE CLAUSE

Appellant contends that the VCCA violates the Dormant Commerce Clause of the Constitution because it regulates transactions that take place outside Virginia's jurisdiction.[6] Generally, "[a] state statute must be upheld if it 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S.

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[5] We also note that AOL's servers, obviously, do not constitute a public forum.

[6] Appellant, therefore, does not contend that the law discriminates against interstate commerce in favor of intrastate commerce, and we do not engage in such an analysis.

137, 142 (1970)) (omission in original); *see also Fredericksburg Auto Auction v. Dep't of Motor Vehicles,* 242 Va. 42, 50, 406 S.E.2d 23, 28 (1991) (applying *Pike* balancing test).

While appellant contends that regulations which can have a wholly extraterritorial effect are *per se* violations, recent authorities have found such factors to be merely a subset of the *Pike* balancing test, which is restated above in the quote from *Edgar. See Heckel,* 24 P.3d at 411 ("the extra territoriality analysis [is] appropriately regarded as [a facet] of the *Pike* balancing test"); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 Yale L.J. 785, 804-05 (2001) ("the appropriate statement of the extraterritoriality concern is that states may not impose burdens on out-of-state actors that outweigh the in-state benefits"). Thus, the issues are whether the VCCA has local benefits and whether the burden imposed on interstate commerce by the law is clearly excessive in relationship to those benefits.

That anti-spam laws, in general, produce local benefits is unquestionable. The United States Congress has found that "[t]he convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail." 15 U.S.C. § 7701. Furthermore, Congress found that spam costs recipients extra money, may expose recipients to

obscene material, costs e-mail providers money, and is frequently fraudulent or deceptive.[7] *Id.* Numerous courts have found that states have an interest in protecting residents and service providers from the costs of handling spam and the often fraudulent content it presents. *See Heckel,* 24 P.3d at 411; *MaryCLE, LLC v. First Choice Internet, Inc.,* 890 A.2d 818, 835 (Md. Ct. Spec. App. 2006) (finding state interest in a personal jurisdiction context); *Ralsky,* 203 F. Supp. 2d at 621-22 (also in a personal jurisdiction context). As the trial court noted, "[t]he Commonwealth clearly has an interest in the protection of the property interests of its citizens."

As noted in Part V(B), *supra,* of this opinion, AOL expends significant resources in efforts to protect its private property from spammers and in so doing offer better service to millions of its subscribers. We find that Virginia properly has a significant local interest in protecting the property of its citizens. The VCCA addresses that legitimate interest.

With that finding, then, we next must determine what burden, if any, on commerce that the VCCA presents. The VCCA requires only that senders of unsolicited bulk e-mail not intentionally "falsify or forge electronic mail transmission information or other routing information." Code § 18.2-152.3:1(A)(1).

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[7] In fact, the Senate Report that accompanied the CAN-SPAM act found that two-thirds of all spam contains fraudulent content. S. Rep. No. 108-102, at 2-3 (2003).

Thus, as the trial court noted, the only burden on any sender is to present truthful transmission and routing information.

We agree with one pair of commentators who noted

> Even assuming that the antispam laws do not significantly further the state's interest, it is hard to see how the antispam laws burden interstate commerce at all. . . . Far from burdening commerce, the truthfulness requirement facilitates it by eliminating fraud and deception. Compliance with the various antispam statutes is easy compared to noncompliance, which requires the spammer to incur costs of forging, re-mailing, and the like.

Goldsmith & Sykes, *supra,* at 819.

Indeed, it is in furtherance of commerce that the VCCA requires truthful transmission data, enabling the purchasing party to consummate a transaction. As the record shows, the e-mails in this case appeared to come from thousands of e-mail addresses at multiple "hello" domains with thousands of different IP addresses, tactics used to disguise spam and avoid detection by spam filters that ISPs such as AOL employ. Notably, if an e-mail recipient "clicked" to buy one of appellant's offers, the recipient was redirected to one of the thousands of websites appellant established in his effort to evade AOL's spam filters.

Finally, we note one court's observation that "Congress, in enacting CAN-SPAM, expressly accorded the States the right to regulate false and misleading e-mail transmissions. 15 U.S.C. 7707(b)(1). If Congress itself was satisfied that supplementary state legislation would impose no undue burden on interstate commerce, this Court can hardly presume to tell Congress it is wrong." *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 535 (D. Md. 2006).

The effort required to violate the VCCA, and its requirement of truthful transmission information, is significant. No effort is required to comply with the law. Applying the balancing test set forth in *Pike*, Virginia does have a legitimate local public interest in the VCCA and any burden to interstate commerce is incidental and clearly not excessive. Thus, the VCCA does not violate the Dormant Commerce Clause.

VII.

CONSTITUTIONAL VAGUENESS

We reiterate that we consider constitutional questions *de novo*, pursuant to the standard of review set forth above in Part V(B), *supra*, of this opinion.

Appellant maintains that the VCCA is unconstitutionally vague in three instances: 1) that the words "unsolicited" and "bulk" in the phrase "unsolicited bulk electronic mail" are undefined, and thus vague; 2) that the phrase "electronic mail

transmission information or other routing information" is undefined, and likewise vague; and 3) that the use of the acronym "UBE" for the earlier phrase "unsolicited bulk electronic mail" is vague. In arguing these points, appellant seeks to challenge the validity of the statute on its face, rather than as applied to him.

As discussed above in Part V(A), *supra,* a litigant generally may only challenge the validity of a statute as applied to him and may not present the rights of third parties. A party may present a facial challenge that a statute is overbroad when the statute touches upon First Amendment rights, and a party may likewise make a facial challenge that a statute is vague when it potentially chills First Amendment rights. *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983); *Broadrick,* 413 U.S. at 611-12; *United States v. Nat'l Dairy Prods. Corp.,* 372 U.S. 29, 36 (1963).

In support of his argument that he is entitled to a facial challenge on these grounds, appellant relies upon *Reno v. ACLU,* 521 U.S. 844 (1997), and the decision of this Court in *Coleman v. City of Richmond,* 5 Va. App. 459, 364 S.E.2d 239 (1988).

The Supreme Court addressed a First Amendment facial challenge to two New York statutes "enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet" in *Reno,* 521 U.S. at 849. The core of the Court's decision turns on the inherent difficulties of sufficiently defining such terms as "obscene" or

"indecent" without intruding on constitutionally protected speech.

In *Coleman*, we found unconstitutionally vague a city ordinance which prohibited loitering with the purpose of finding a prostitute. We noted therein that loitering is a lawful act entitled to constitutional protection on First Amendment grounds. 5 Va. App. at 464, 364 S.E.2d at 242 (citing *Papachristou v. City of Jacksonville,* 405 U.S. 156, 164 (1972)). As a United States District Court later stated regarding a challenge to a Virginia statute, "Any attempt to prohibit loitering potentially implicates First Amendment rights." *Lytle v. Doyle,* 197 F. Supp. 2d 481, 488 (E.D. Va. 2001). Our denial of a petition for rehearing in *Coleman* makes clear that the decision was based on First Amendment grounds: "Coleman raised freedom of association and first amendment rights. Our decision . . . held the Richmond ordinance unconstitutional on its face in light of first amendment concerns." *Coleman v. City of Richmond,* 6 Va. App. 296, 298, 368 S.E.2d 298, 300 (1988).

In Part V(B), *supra,* of this opinion, we hold that the VCCA does not implicate First Amendment rights. Both *Reno* and *Coleman* are premised upon such rights. Thus, appellant's reliance on these decisions to establish his right to a facial challenge to the VCCA is misplaced.

We therefore will consider appellant's arguments based upon the law as applied to his conduct. "'[V]agueness challenges to statutes not threatening

First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.'" *Motley v. Virginia State Bar,* 260 Va. 243, 247, 536 S.E.2d 98, 99 (2000) (quoting *Maynard v. Cartwright,* 486 U.S. 356, 361 (1988)); *see also Muhammad v. Commonwealth,* 269 Va. 451, 501, 619 S.E.2d 16, 44 (2005) (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-95 (1982)).

As applied to appellant's actions, the VCCA "is unconstitutionally vague if it fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . .'" *County of Fairfax v. S. Iron Works, Inc.,* 242 Va. 435, 444-45, 410 S.E.2d 674, 680 (1991) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). A law can also be vague if it allows for "arbitrary and discriminatory enforcement." *Kolender,* 461 U.S. at 357.[8]

Applying that standard, we analyze each of appellant's three contentions seriatim.

A.

The word "unsolicited" is not unconstitutionally vague because, among states with laws relating

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[8] Appellant's only challenge under the "arbitrary and discriminatory enforcement" prong of the vagueness test is a facial one to the misdemeanor provisions of the statute, under which appellant was not charged. As appellant is entitled only to an as-applied challenge, we need not discuss the second prong.

to spam, "unsolicited" has a practically universal definition.[9] An e-mail is unsolicited if the recipient neither requested nor consented to receive such e-mails and if the sender and recipient have no preexisting business or personal relationship. Generally included within this definition, although sometimes explicitly stated in statutes, is the notion that an organization may send e-mails to its members, employees, or contractors and that such e-mails are not "unsolicited."

Aside from the consistency with which other states define the term, this seems to be the only logical meaning. No one would argue that an e-mail is unsolicited if the recipient requested or consented to its transmission. Furthermore, once two parties have established a relationship, communications cannot be considered unsolicited for purposes of a criminal

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[9] *See, e.g.*, Ark. Code Ann. § 4-88-602 (West Supp. 2005) ("'Unsolicited' means without the recipient's express permission, except that commercial electronic mail is not unsolicited if the sender has a preexisting business or personal relationship with the recipient"); Mich Comp. Laws. Ann. § 445.2502 (West Supp. 2006) ("'Unsolicited' means without the recipient's express permission. An e-mail is not unsolicited if the sender has a preexisting business or personal relationship with the recipient. An e-mail is not unsolicited if it was received as a result of the recipient opting into a system in order to receive promotional material."); N.C. Gen. Stat. Ann. § 14-453 (West 2000) ("'Unsolicited' means not addressed to a recipient with whom the initiator has an existing business or personal relationship and not sent at the request of, or with the express consent of, the recipient.").

statute simply because one party did not specifically request it of the other. Thus, an e-mail is "unsolicited" if the parties have no previously existing relationship, either business or personal, and the recipient did not request or consent to its transmission.

Given the consistency and logical power of this definition as applied to appellant, he would certainly have known that these e-mails were unsolicited. Appellant sent thousands of e-mails at random to AOL subscribers whose addresses were among the 107 million stolen AOL e-mail addresses stored on discs in his possession. Appellant did not compile a mailing list by allowing people to register their names, nor did he build this list from previous contacts with people. He obtained a stolen database of AOL e-mail addresses and sent his messages out blindly.

Appellant's contention that "bulk" is a vague term also fails because the law specifically defines the word. Code § 18.2-152.3:1(B)(1) establishes that transmission "exceed[ing] 10,000 attempted recipients in any 24-hour period" constitutes a felony. Appellant admits that this section sufficiently defines how many e-mails constitute "bulk" but maintains that for lesser amounts of spam, the statute is vague. As noted above, the record reveals that appellant sent 12,197 falsified e-mails on July 16, 2003; 24,172 falsified e-mails on July 19, 2003; and 19,104 falsified e-mails on July 26, 2003. Because the statute clearly prohibits his conduct, appellant's challenge fails. *Hoffman Estates,* 455 U.S. at 495 ("A plaintiff who

engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

B.

Appellant next contends that the phrase "electronic mail transmission information or other routing information" is vague. Initially, we note that the Supreme Court of Virginia has already defined the word "route" as meaning "a direction of travel from one place to another." *Virginia Stage Lines, Inc. v. Commonwealth,* 186 Va. 1066, 1076, 45 S.E.2d 318, 323 (1947). Routing information, then, would be the information that directs the message from one place to another, or the record of that travel.

"We give the words of a statute 'their common, ordinary and accepted meaning,' absent an indication by the legislature to the contrary." *Saunders v. Commonwealth,* 48 Va. App. 196, 201, 629 S.E.2d 701, 703 (2006); *see also Stein v. Commonwealth,* 12 Va. App. 65, 68, 402 S.E.2d 238, 241 (1991) (citing *Lovisi v. Commonwealth,* 212 Va. 848, 850, 188 S.E.2d 206, 208 (1972)). "[C]ourts are bound by the plain meaning of clear statutory language." *Crawford v. Haddock,* 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005) (citations omitted); *see also Last v. Virginia State Bd. of Med.,* 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992) ("Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."). Words that have

commonly accepted meanings within their statutory *context* are not vague. *See, e.g., Gray v. Commonwealth,* 260 Va. 675, 681, 537 S.E.2d 862, 865 (2000) (noting contextual meanings of "muffler" and "silencer" in firearms statute).

Appellant maintains that the phrase "transmission information" is vague. *Black's Law Dictionary* defines "transmit" as "[t]o send or transfer from one person or place to another, or to communicate." 1505 (7th ed. 1999). Thus, the common, ordinary and accepted meaning of the term is that it means the data necessary to transmit, or carry, the e-mail from its origin to its intended recipient.

The VCCA's requirement that the falsification or forgery of the transmission information or routing information be *intentional* further serves to protect that statute from a vagueness challenge. As the Supreme Court noted in *National Dairy Products*, "a requirement of intent [can serve] to 'relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.'" 372 U.S. at 35 (quoting *Screws v. United States,* 325 U.S. 91, 102 (1945)). This Court has similarly noted that "[b]y requiring specific intent . . . [a] statute gives a person of ordinary intelligence a reasonable opportunity to know what is proscribed." *Woolfolk v. Commonwealth,* 18 Va. App. 840, 851, 447 S.E.2d 530, 536 (1994) (citations omitted); *see also Hernandez v. Commonwealth,* 12 Va. App. 669, 672, 406 S.E.2d 398, 400 (1991) (holding the intent

requirement, in part, makes constitutional a statute prohibiting wearing of mask in public).

In *National Dairy Products*, the Court also held the challenged statute constitutional because the statute "listed as elements of the illegal conduct . . . the intent to achieve a result . . . [and] also the act . . . done in furtherance of that design or purpose." 372 U.S. at 35. The VCCA operates similarly. It establishes the illegal conduct (lying to commit a trespass on computer servers), identifies an act done in furtherance (falsification of routing or transmission information), and requires the act be done intentionally.

Here, appellant intended to falsify his identity and the origins of his e-mails in order to avoid detection by AOL's spam filters. The complicated machinations necessary to achieve this criminal purpose negate any contention that the phrase "transmission information or other routing information" is vague. Appellant's conduct is exactly the conduct the statute seeks to criminalize, and appellant intentionally undertook those acts.

C.

Code § 18.2-152.3:1(A) of the VCCA contains the phrase "unsolicited bulk electronic mail." Subsection B uses the acronym "UBE" for the phrase quoted from subsection A. For example, a sentence in subsection B begins: "The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour

period . . . ." Appellant maintains the use of the acronym renders the statute impermissibly vague.

Recently, the Supreme Court of Virginia set out principles of statutory interpretation here applicable:

> Generally, the Court "will look to the whole body of [a statute] to determine the true intention of each part." *McDaniel v. Commonwealth,* 199 Va. 287, 292, 99 S.E.2d 623, 627 (1957); *accord Rockingham Coop. Farm Bureau, Inc. v. City of Harrisonburg,* 171 Va. 339, 344, 198 S.E. 908, 910 (1938). "[A] statute should be read and considered as a whole, and the language of a statute should be examined in its entirety to determine the intent of the General Assembly from the words contained in the statute." *Dep't of Med. Assistance Servs. v. Beverly Healthcare of Fredericksburg,* 268 Va. 278, 285, 601 S.E.2d 604, 607-08 (2004). "In doing so, the various parts of the statute should be harmonized so that, if practicable, each is given a sensible and intelligent effect." *Colchester Towne Condo. Council of Co-Owners v. Wachovia Bank, N.A.,* 266 Va. 46, 51, 581 S.E.2d 201, 203 (2003) (citing *VEPCO v. Prince William County,* 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983)).

Oraee v. Breeding, 270 Va. 488, 498, 621 S.E.2d 48, 52-53 (2005).

More specifically, the acronym "UBE" is to be given meaning "in the context in which it is used." *Dep't of Taxation v. Orange-Madison Coop. Farm*

Serv., 220 Va. 655, 658, 261 S.E.2d 532, 534 (1980). "[T]he context may be examined by considering other language used in the statute." *City of Virginia Beach v. Bd. Of Supervisors of Mecklenburg County,* 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993).

Applying these principles, the only reasonable interpretation of the acronym within the statute is that it means "unsolicited bulk electronic mail." We hold that the acronym "UBE" in the context used and in relation to the other language in the VCCA is not so vague that a person of ordinary intelligence could fail to understand its meaning.

For the reasons stated above, the VCCA is sufficiently definite so as to not be unconstitutionally vague as applied to appellant's conduct.

VI.

CONCLUSION

Having concluded that the trial court had jurisdiction over this case and that Code § 18.2-152.3:1 does not violate the First Amendment, does not violate the Dormant Commerce Clause, and is not unconstitutionally vague, appellant's convictions are affirmed.

Affirmed.

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No. 08-765

Supreme Court, U.S.
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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Virginia Supreme Court compared Virginia Code § 18.2-152.3:1's plainly legitimate sweep to the protected speech forbidden by the statute, found that the statute's overbreadth was "substantial," and concluded that there was a realistic likelihood that the statute would reach—and chill—protected speech, did it err by failing also to conduct a statistical "comparative analysis" of the number of potentially legitimate applications versus potentially illegitimate applications?

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STATEMENT OF THE CASE

Respondent Jeremy Jaynes was sentenced to nine years in prison for violating Virginia Code § 18.2-152.3:1, Virginia's anti-spam statute. Under this statute, it is a crime for a person to include false identifying information in a mass-distributed e-mail:

> [A]ny person is guilty of a crime if he:
>
> Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer of an electronic mail service provider or its subscribers.

Va. Code § 18.2-152.3:1(A). Where the defendant attempts to send messages to more than 10,000 attempted recipients in a 24-hour period, it is a Class 6 felony, punishable by up to five years in prison for each offense. Va. Code § 18.2-152.3:1(B); Va. Code § 18.2-10(f). Jaynes was convicted on three counts and sentenced to three years on each, to run consecutively, for a total of nine years.

Jaynes appealed his conviction to the Court of Appeals of Virginia and then to the Supreme Court of Virginia. He mounted a facial challenge to the statute. That is, he claimed that even though his own conduct could constitutionally be regulated, Code § 18.2-152.3:1 was overbroad and violated the rights of persons who were not before the Court.

Virginia opposed Jaynes's attempt to mount a facial challenge. It claimed that the facial-standing issue was governed by state law and that, as a

matter of Virginia law, Jaynes could not raise a facial challenge.[1] It also argued that Jaynes could not mount a facial challenge because he was engaged in unprotected commercial speech. Finally, Virginia argued that the court should adopt a construction of the statute that limited its application to constitutionally unprotected speech.

In its unanimous September 12, 2008 decision, the Virginia Supreme Court rejected Virginia's arguments and reversed Jaynes's conviction. The court noted that the statute made it a crime to send bulk e-mails anonymously. While it acknowledged that commercial bulk e-mails might constitutionally be regulated in this manner, it found that the statute extended beyond this to encompass non-commercial bulk e-mails. Because the statute encroached on protected anonymous speech, the court permitted Jaynes to raise a facial challenge to it.

Examining the statute on the merits, the court found that it had not been crafted with the care or precision that the First Amendment requires. By its plain terms, the statute extended well beyond the fraudulent and otherwise illegal e-mail that Virginia claimed was the statute's true target:

> Code § 18.2-152.3:1 is not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected speech such as

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[1] Virginia relied principally on this Court's decision in *Virginia v. Hicks*, 539 U.S. 113 (2003). In that case, this Court stated, "[W]hether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law." *Id.* at 121 (emphasis in original). The parties disagreed how that holding in *Hicks* applied to the facts of this case.

> pornography or defamation speech. Therefore, viewed under the strict scrutiny standard, Code § 18.2-152.3:1 is not narrowly tailored to protect the compelling interests advanced by the Commonwealth.

(Pet. App. at 24-25). Accordingly, the court found that the "statute is overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment," and it reversed Jaynes's conviction.[2]

This appeal followed.

REASONS FOR DENYING THE WRIT

The Petition in this case is more remarkable for what it omits than for the actual question it presents.

To begin, Petitioner does *not* seek review on the substantive First Amendment issue addressed below; namely, whether Code § 18.2-152.3:1 was narrowly tailored to protect a compelling state interest. For good reason. The statute in question encompasses all anonymous emails—even those

---

[2] In the proceedings before the Virginia Supreme Court, Jaynes presented alternate grounds for reversing his conviction; namely, that Code § 18.2-152.3:1 was void for vagueness and that the practical effect of the statute was to regulate interstate commerce, in violation of the dormant Commerce Clause. Because the Virginia Supreme Court disposed of the issue on First Amendment grounds, it did not reach those issues. Nevertheless, these issues present alternate grounds for affirmance.

advocating political causes or proselytizing for religious creeds—and makes it a felony to send out an e-mail blast without properly identifying oneself. Yet Virginia presented no evidence that non-commercial bulk e-mail was a significant problem that the legislature needed to address. Thus, the statute was not narrowly tailored and cannot survive strict scrutiny on the merits.

Nor has the Petitioner sought review on the substantive question of whether the First Amendment protects the right to send anonymous non-commercial communications about religion and politics. And rightly so, for that too is settled law.

Petitioner instead restricts its appeal to the question of facial standing. But here, again, the appeal is noteworthy for what it does not argue. Petitioner does not ask this Court to address the specific question of whether and when a court should entertain a facial challenge to a statute that requires Internet users to identify themselves. Again, there is a good reason for this: the courts that have addressed facial standing in this context analyze the issue identically—the outcome hinges on whether or not the statute in question targets protected non-commercial speech.[3] So there is no split in authority that would justify certiorari.

Instead, Petitioner has constructed a highly abstract question about the means of conducting overbreadth analysis—an approach that demands mathematical precision in comparing the number of instances in which the statute would be applied unconstitutionally with the number of instances in which the statute would be applied constitutionally.

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[3] *See infra* note 7.

But Petitioner never presented that argument to the Virginia Supreme Court. Moreover, Petitioner has not shown that the lower courts are divided on the question. At best, it has shown that there have been a number of fact-bound decisions in various federal and state courts that apply the same general principles to a wide variety of disparate situations. Nor, indeed, is the decision below contrary to this Court's teachings on substantial overbreadth. For all these reasons, set forth more fully below, this Court should deny certiorari.

I. VIRGINIA RAISES ITS "COMPARATIVE ANALYSIS" ARGUMENT FOR THE FIRST TIME IN ITS PETITION.

As an initial matter, this Court should deny certiorari because the arguments that Virginia advances in its Petition were not presented below.

In its Petition, Virginia argues that the Supreme Court of Virginia erred because, in evaluating whether Jaynes could make a facial challenge, it did not carefully "compar[e] the constitutional applications (legitimate sweep) to the unconstitutional applications." (Pet. at 12-13). It claims that the overbreadth doctrine required the lower court to undertake a "comparative analysis" in which it contrasts the quantity of "plainly legitimate applications" with the quantity of "application[s] to protected speech." (Pet. at 17, 21).

These are new arguments. In the proceedings before the Virginia Supreme Court, the Commonwealth presented entirely different reasons for why it thought that Jaynes did not have the right to mount a facial challenge to Code § 18.2-152.3:1. First, it argued that the question was a matter of

state law, not federal law, and that Virginia's law of standing barred Jaynes's facial challenge: "[T]he question of who may bring a facial challenge alleging overbreadth is a matter of state law." (Comm. Br. at 26). Second, it argued that Jaynes could not raise a facial challenge because Jaynes himself was engaged in unprotected speech: "A litigant, such as Jaynes, who engages in commercial speech should not be allowed to pursue a facial challenge alleging overbreadth." (Comm. Br. at 28). Third, it argued that the court should adopt a construction of the statute that exempted "unsolicited bulk non-commercial e-mail that does not involve criminal activity, defamation, or obscene materials" and that applied only where the recipient's ISP "actually objects to the bulk e-mail." (Comm. Br. at 35-36). Petitioner lost all three of these arguments, but has not appealed the Virginia Supreme Court's rulings on any of those points.

Relevant here, Petitioner did *not* argue—as it now does—that, before entertaining a facial challenge, the court had to undertake a "comparative analysis," measuring the quantity of protected speech affected by the statute versus unprotected speech affected by the statute.[4]

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[4] The only discussion of "overbreadth" in Virginia's brief to the Supreme Court of Virginia appears in Section V. (Comm. Br. at 34). But that discussion addresses only the substantive constitutionality of the statute, not Jaynes's standing to present a facial—as opposed to an as-applied—challenge to the statute. This is made clear by the heading to that section, which states "*Assuming that Jaynes may bring a facial challenge* alleging overbreadth, then the act is not overbroad." (Comm. Br. at 32) (emphasis added). In other words, that argument presupposed that Jaynes could raise a facial challenge—precisely the point Virginia now disputes.

Arguments not raised below are waived on appeal. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) ("In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."). Because Virginia did not present its "comparative analysis" argument below, this Court should deny certiorari.

II. THERE IS NO SPLIT IN THE LOWER COURTS ABOUT THE STANDARD FOR SUBSTANTIAL OVERBREADTH.

The overbreadth doctrine originated in *Thornhill v. Alabama*, 310 U.S. 88 (1940), and has been discussed in dozens of this Court's decisions in the ensuing decades.[5] By now, "the elements of First Amendment overbreadth analysis are familiar." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). So, too, is the principle of "substantial overbreadth." *See New York v. Ferber*, 458 U.S. 747, 772 (1982) ("The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel."). Time and again during the last quarter century—and as recently as last term—this Court has reiterated that for a statute to be subjected to a facial challenge, its

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[5] *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482-83 (1989); *City of Houston v. Hill*, 482 U.S. 451, 458-59 (1987); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13 (1973).

"overbreadth [must be] substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).[6]

In its Petition, however, Virginia claims that there is a conflict among jurisdictions about how to apply this Court's substantial-overbreadth test. Cherry-picking a handful of lower-court cases from the last three decades of overbreadth litigation, Virginia claims that there is a "deep" conflict of authority on the standard for evaluating substantial overbreadth. (Pet. at 23-27). It posits the existence of two opposing camps: (1) an "absolutist" cadre, comprising the Eighth Circuit, Virginia, Hawaii, Idaho, and Iowa, that will—Virginia claims—strike down a statute on First Amendment grounds wherever there is a "conceivable" possibility that protected speech might be threatened; and (2) a

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[6] Although the Court frequently has invoked and applied its substantial-overbreadth standard, it has resisted attempts to make the test any more fine-grained than that. The reason lies in the difficulty of the subject matter. *See Broadrick*, 413 U.S. at 615 ("It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate.") (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971)); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("The concept of 'substantial overbreadth' is not readily reduced to an exact definition."). Whether a particular statute or ordinance is substantially overbroad is a context-specific inquiry that requires the reviewing court to make a nuanced and pragmatic evaluation of the law being examined. It is not a subject that lends itself well to prongs, bright lines, or numerical cut-offs. Applying the doctrine requires sound judgment—not wooden application of a rigid rule.

"comparative" group of courts, comprising the First, Third, and Tenth Circuits, that approaches the issue with mathematical objectivity—comparing the relative incidence of protected versus unprotected speech and allowing facial challenges only when that ratio is high.

A review of the cases and jurisdictions reveals no real conflict of the sort that Virginia describes. It simply illustrates the highly context-specific nature of the substantial-overbreadth inquiry.

A. The "Absolutist" Jurisdictions Are Not Absolutist.

To begin, the decisions that Virginia characterizes as "absolutist" are actually a heterogeneous group of cases. They arise in factual circumstances very different from those presented here.[7] Indeed, many of them do not even address whether, and under what circumstances, a party may make a facial challenge in the First Amendment context.

Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785 (8th Cir. 2008), for example,

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[7] Jaynes notes that the two lower court cases that have dealt with the issue of substantial overbreadth in the specific context of anonymous Internet speech have both analyzed the issue similarly to the Supreme Court of Virginia—focusing on whether the statute extended beyond commercial speech. *See ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (allowing facial challenge to Georgia Internet-identity statute because it extended to protected non-commercial speech), and *United States v. Twombly*, 475 F. Supp. 2d 1019, 1024 (S.D. Cal. 2007) (rejecting facial challenge to federal CAN-SPAM statute because statute was restricted to commercial speech). Virginia fails to cite either of these cases.

involved a bankruptcy statute that made it illegal for a "debt relief agency" to advise a debtor to amass more debt before filing for bankruptcy. The court found that "*as applied*" to attorneys, the statute was unconstitutional because it unlawfully intruded upon the ability to advise the client on bankruptcy matters.

Even less relevant is the holding in *Hawaii v. Beltran*, 172 P.3d 458, 464 (Haw. 2007), which was decided under Hawaiian constitutional law. This was a challenge to an ordinance that required a permit for "camping," but which defined "camping" to mean any activity that looked like setting up a residence—regardless of the actual conduct involved. The court noted that this definition was overbroad because it encompassed conduct protected by the *Hawaii* constitution: "The limitless net cast by the Rule would seemingly reach a substantial amount of constitutionally protected conduct *under the Hawai'i Constitution*." Id. (emphasis added).

Even the purported "absolutist" cases that *do* involve actual, facial, First Amendment challenges are themselves not remarkable or absolutist. *Idaho v. Casey*, 876 P.2d 138 (1994), for example, involved a statute that made it a crime to interfere with lawful hunting. The statute's "statement of purpose" declared that it was aimed at "protest groups" who had, in the past, deliberately interfered with hunting activities. The court agreed that there was a "realistic danger" that the statute would interfere with protected speech—e.g., members of protest groups who verbally expressed their opposition to hunting. Id. at 140-41. Given the history and stated purpose of the statute to rein in "protest groups,"

this was a fair assessment of the likely effect of this statute on free speech.

The other state supreme court case[8] that Virginia cites, *City of Maquoketa v. Russell*, 484 N.W.2d 179, 185-86 (Iowa 1992), was a facial challenge to a curfew ordinance that made it a crime for minors to be in a public place after 11 p.m. without parental escort or permission. The Supreme Court of Iowa held that this ordinance impermissibly restricted minors' rights of assembly, religion, and speech. As the ordinance was a blanket prohibition on *any public conduct* after 11 p.m., the court found that it was reasonable to suppose that the statute infringed on much conduct that was protected by the First Amendment. This was not a law struck down on the basis of a single, fanciful hypothetical. It was invalid because it criminalized a broad range of protected conduct—viz., *any* public activity after 11 p.m.

These cases, in short, do *not* stand for the sweeping proposition that a statute is unconstitutional if it "conceivably [could] reach constitutionally protected speech or expression." (Pet. at 27). Indeed, they define no single approach to facial challenges. Instead, they reflect pragmatic and context-specific judgments about whether the particular statutes in question would, in fact, substantially interfere with rights guaranteed by the First Amendment.

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[8] The other two "absolutist" cases that Virginia cites are lower-court cases—a federal district court case from New York and an intermediate state appeals court from Florida. Conflicts among such courts do not ordinarily generate the sort of split in authority justifying this Court's review under Rule 10.

B. The "Comparative" Jurisdictions Are Not Comparative.

Virginia's characterization of the opposing "comparative" camp is equally flawed. The principal example it cites is the Third Circuit's decision in *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008). But after the Third Circuit decided *Borden*, this Court issued its decision in *Williams*, which reiterated the proper standard for substantial overbreadth.

Shortly after this Court decided *Williams*, the Third Circuit issued another facial-standing decision, which Virginia does not discuss: *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 598 (Jan. 21, 2009). This was a First Amendment challenge to the Child Online Protection Act ("COPA"), on remand from this Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). In its July 22, 2008 decision, the Third Circuit quoted and applied this Court's formulation of the overbreadth doctrine in *Williams*. It found that the statute at issue "impermissibly places at risk a wide spectrum of speech that is constitutionally protected." *Id.* at 206. And it noted that the statute "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* Because COPA, like Code § 18.2-152.3:1, outlawed broad categories of protected speech, the Third Circuit allowed the plaintiffs to mount a facial challenge.

Notably, the Third Circuit did *not* perform the sort of quantitative analysis—comparing the relative incidence of protected versus unprotected speech—

that Virginia now claims is essential to the Third Circuit's "comparative" approach to the substantial-overbreadth issue. The fact that the statute outlawed "a wide spectrum" of protected speech was enough.

So even the Third Circuit, the alleged standard-bearer of the "comparative" approach, found that a quantitative analysis was unnecessary when, as with Code § 18.2-152.3:1, the challenged statute outlawed broad categories of protected Internet speech. *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. Aug. 4, 2008) (striking down a university harassing-speech policy as facially overbroad without first undertaking an empirical comparison of the relative percentages of protected versus unprotected speech covered by the policy).

* * *

This Court should see Virginia's conflict-in-authority argument for what it is: a creative attempt to obtain certiorari by manufacturing a fissure in the case law that simply does not exist. It is notable that none of the cases that Virginia cites discusses this so-called "conflict" in authority. Nor has Virginia cited any secondary literature that mentions such a "conflict." The silence on this issue is telling.

III. THE PRACTICAL SIGNIFICANCE OF THIS CASE TO ANTI-SPAM EFFORTS IS NEGLIGIBLE.

In their briefs, Virginia and Amici argue that the ruling of the Supreme Court of Virginia jeopardizes anti-spam efforts across the country. Although Virginia acknowledges that most states—and the federal government—restrict their anti-spam

statutes to commercial spam, it claims that "ten" states have anti-spam statutes that, like Code § 18.2-152.3:1, do not differentiate between commercial and non-commercial bulk e-mails. (Pet. at 7, n.2). Thus, it suggests, if the courts of these 10 states follow the Supreme Court of Virginia's lead, then their statutes also might be found to be unconstitutional. Amicus United States Internet Service Provider Association, too, decries the effect of the Supreme Court of Virginia's decision on anti-spam efforts. (Am. Br. of US ISPA at 10).

This hand-wringing is unwarranted. As an initial matter, Petitioner's analysis of its Sister States' laws is faulty. Two of the states that it characterizes as banning "all spam," Idaho and Louisiana, actually limit their anti-spam efforts to commercial spam.[9] Another state, Illinois, bans only those e-mails that are sent without the authority of the computer user. (This is akin to a trespass statute and is *unlike* Code § 18.2-152.3:1, which applies even if the recipient wishes to receive unsolicited e-mails.) Of the remaining seven states, two states, West Virginia and Oklahoma, impose only civil sanctions for violations. *See* W. Va. Code § 46A-6G-5; 15 Okla. Stat. § 776.2, 776.7. So only five states—none of which has joined the Amici in this case—are similar to Virginia in imposing criminal penalties for unsolicited non-commercial bulk e-mails regardless

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[9] Idaho's anti-spam statute applies only to "bulk electronic mail advertisements." Idaho Code § 48-603E. Louisiana defines "unsolicited bulk electronic mail" to include only those emails that are "developed or distributed in an effort to sell or lease consumer goods or services." La. Rev. Stat. § 14:73.1(13).

of whether the recipient has authorized the transmission.[10]

Even for those five states, the cure for the problem is simple: limit anti-spam statutes to commercial e-mails. In the interim, the federal CAN-SPAM Act—which *is* restricted to commercial e-mail and has withstood First Amendment challenges—provides a federal remedy against spammers. The undeniable fact is that this case's effect on anti-spam efforts is negligible, at most. As correctly observed by John Levine, an expert on Internet issues who testified for the prosecution in this case, the Supreme Court of Virginia's decision has "little practical effect beyond this single case."[11]

IV. THE VIRGINIA SUPREME COURT CORRECTLY APPLIED THE OVERBREADTH DOCTRINE.

Finally, certiorari is not appropriate as a matter of error correction because there was no error below. The facts of the present case show that the Virginia Supreme Court correctly applied this Court's substantial-overbreadth standard and properly allowed Jaynes to mount a facial challenge to Code § 18.2-152.3:1.

As this Court noted in *Williams*, the initial step in any overbreadth analysis is to interpret the

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[10] These are Connecticut, Iowa, Nevada, Pennsylvania, and Tennessee.

[11] John Levine, "Virginia Court Overturns Anti-Spam Law, Sept. 13, 2008, http://www.cauce.org/archives/87-Virginia-Court-Overturns-anti-spam-law.html (last visited February 5, 2009).

statute in question. 128 S. Ct. at 1838 ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). If the problematic overbreadth can be excised with a limiting construction, then that ends the inquiry. *Id.* at 1848 ("[A]ny constitutional concerns that might arise . . . are surely answered by the construction the court gives the statute's operative provisions").

On this point, it is significant that the present case concerns a Virginia statute and arises on direct appeal from the Virginia Supreme Court. Where, as here, this Court reviews a state-court decision that has interpreted a state statute, the construction placed on the statute by the state court is binding on this Court. *See New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) ("Here, of course, we are dealing with a state statute on direct review of a state-court decision that has construed the statute. Such a construction is binding on us."); *R. A. V. v. City of St. Paul*, 505 U.S. 377, 412 (1992) ("Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is not one that we would have reached if we were construing the statute in the first instance.") (White, J., concurring). This is so because under our federal system, the Virginia Supreme Court is the authoritative expositor of the meaning of Virginia statutes.

In the proceedings below, Virginia argued that Code § 18.2-152.3:1 should be narrowly construed to (1) exempt "unsolicited bulk non-commercial e-mail that does not involve criminal activity, defamation or obscene materials" and (2) apply only where the recipient's ISP "actually objects to the bulk e-mail."

(Pet. App. at 27). Narrowing the statute in this way would, of course, have eliminated much of the statute's problematic overbreadth. But in its decision, the Virginia Supreme Court held that there was no textual basis for such a limiting construction:

> Our jurisprudence requires us to interpret a statute to avoid a constitutional infirmity. Nevertheless, construing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. A statute cannot be rewritten to bring it within constitutional requirements. The construction urged by the Commonwealth is not a reasonable construction of the statute. Nothing in the statute suggests the limited applications advanced by the Commonwealth. If we adopted the Commonwealth's suggested construction we would be rewriting Code § 18.2-152.3:1 in a material and substantive way. Such a task lies within the province of the General Assembly, not the courts.

(Pet. App. at 27-28) (internal citations omitted). Not only is this reasoning sound, it is binding on this Court. Thus, unlike the federal statute in *Williams*, Code § 18.2-152.3:1 cannot be purged of its overbreadth simply by adopting a narrowing construction that limits the statute's application to constitutionally less-protected speech. This Court must take the statute as the Virginia Supreme Court has interpreted it.

Evaluating Code § 18.2-152.3:1 in light of its interpretation, the Supreme Court of Virginia correctly held that the statute was substantially overbroad. The law directly targets speech and its operative provision makes it a crime to falsify "transmission information" with respect to any "unsolicited bulk e-mail."[12] Va. Code § 18.2-152.3:1. The term "unsolicited bulk e-mail" is not restricted to commercial spam. Thus, it extends well beyond the get-rich-quick schemes, mortgage ads, and male-enhancement promotions that have given rise to anti-spam legislation. It also applies to personal e-mails, forwarded jokes and news items, political e-mails, religious e-mails, and every other species of protected e-mail speech.

In this respect, Code § 18.2-152.3:1 is an outlier. Most states have passed anti-spam laws of one form or another. But almost all of them limit their laws regulating (non-sexually-explicit) spam to

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[12] In their amicus brief, Virginia's Sister States attempt to equate falsification with deception and fraud. (Am. Br. of Alabama *et al.* at 20). The two concepts are not identical. A writer can falsify his identity in order to remain anonymous even if no one is thereby fooled into believing that the writer truly is the person he calls himself. When Alexander Hamilton adopted the pen name "Publius," his audience was not deceived into thinking that the he was truly the so-named statesman from ancient Rome. They realized that the author—whoever he was—was adopting an assumed name. Yet as the Supreme Court of Virginia interpreted the statute, Code § 18.2-152.3:1 would apply equally to this sort of innocent use of a pseudonym in an e-mail transmission. (Pet. App. at 26-27).

commercial e-mails.[13] Congress, too, limited the federal "CAN-SPAM" Act to commercial unsolicited

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[13] *See* Ariz. Rev. Stat. § 44-1372.01 (barring falsification of electronic transmission information by sender of "*commercial* electronic mail"); Ark. Code Ann. § 4-88-603 (requiring senders of "unsolicited *commercial* electronic mail" to provide correct identification information); Cal. Bus. & Prof. Code § 17538.45 (regulating "unsolicited electronic mail *advertisements*"); Colo. Rev. Stat. § 6-1-702.5 (regulating "*commercial* electronic mail messages"); Fla. Stat. § 668.603 (regulating "unsolicited *commercial* electronic mail message"); Idaho Code § 48-603E (barring falsification of transmission path of "bulk electronic mail *advertisement*"); Ill. Comp. Stat. tit. 815, § 511/10 (regulating "unsolicited electronic mail *advertisements*"); Ind. Code § 24-5-22-7 (regulating transmission of "*commercial* electronic mail messages"); Kan. Stat. § 50-6, 107 (regulating "*commercial* electronic mail messages"); La. Rev. Stat. § 14:73.1(13) (defining "unsolicited bulk electronic mail" to mean only those that are sent "in an effort to *sell or lease consumer goods or services*"); Me. Rev. Stat. tit. 10, § 1497 (regulating "unsolicited *commercial* e-mail"); Md. Crim. Law Code § 3-805.1 (barring falsification of "multiple *commercial* electronic mail messages"); Mich. Comp. Laws § 445.2504 (barring falsification of sender information for "unsolicited *commercial* e-mail"); Minn. Stat. § 325F.694 (regulating false or misleading "*commercial* electronic mail messages"); Mo. Rev. Stat. § 407.1138 (prohibiting falsification of sender information for "*commercial* electronic mail messages"); N.M. Stat. Ann. § 57-12-23 (regulating e-mails containing "unsolicited *advertisements*"); N.C. Gen. Stat. § 14-458 (unlawful to send "unsolicited bulk *commercial* electronic mail" in violation of e-mail service provider policies); N.D. Cent. Code § 51-27-02 (unlawful to send falsified "*commercial* electronic mail message"); Ohio Rev. Code § 2307.64 (unlawful to forge originating address or routing information of "electronic mail *advertisement*"); S.D. Codified Laws § 37-24-6 (regulating "unsolicited *commercial* electronic mail messages"); Tenn. Code Ann. § 47-18-2501 (prohibiting falsification of transmission information in e-mails consisting of "unsolicited *advertising material*"); Tex. Bus. & Com. Code § 46.002 (barring falsification of transmission information in "*commercial* electronic mail messages"); Wash. Rev. Code § 19.190.020 (prohibiting falsification of transmission information in a "*commercial* electronic mail message"); Wyo. Stat. § 40-12-402 (prohibiting falsification of transmission information in a "*commercial* electronic mail message") (emphasis added in all).

bulk e-mail. *See* 15 U.S.C. § 7704(a) ("It is unlawful for any person to initiate the transmission, to a protected computer, of a *commercial* electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading . . . .") (emphasis added).

Internet-speech regulations that extend beyond commercial speech may, for that reason alone, be found to be overly broad. In *Reno v. ACLU*, for example, this Court held that the Communications Decency Act was overbroad inasmuch as it was "not limited to commercial speech or commercial entities." 521 U.S. 844, 877 (1997).[14] Code § 18.2-152.3:1 is similarly overbroad. It makes no attempt to distinguish between commercial and non-commercial e-mails.

To illustrate the statute's extreme overbreadth, the Supreme Court of Virginia explained that under Code § 18.2-152.3:1, distributing the *Federalist Papers*—which this Court has singled out as the exemplar of anonymity being "assumed for the most constructive purposes"[15]—would be a crime if done by e-mail. (Pet. App. at 27).

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[14] *See also Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 165 (2002) (ordinance barring anonymous door-to-door solicitations was overbroad because it was not restricted to commercial speech); *United States v. Twombly*, 475 F. Supp. 2d 1019, 1024 (S.D. Cal. 2007) (noting, in context of reviewing state spam law, that a "statute reaching beyond purely commercial speech to chill fully protected speech can merit application of the overbreadth doctrine").

[15] *Talley v. California*, 362 U.S. 60, 65 (1960). *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995).

In its Petition, however, Virginia dismissively characterizes this as yet another "hypothetical case" that has been conjured up to justify an otherwise baseless facial challenge. (Pet. at 23). Virginia has missed the point of the *Federalist Papers* example. This was not a "fanciful hypothetical"; it was a *reductio ad absurdum* showing just how intolerably overbroad Code § 18.2-152.3:1 is. If the foundational documents of the Constitution could not legally be disseminated by e-mail under Code § 18.2-152.3:1, then surely the statute itself cannot survive scrutiny under the Constitution.

Virginia's real objection is that the lower court did not quantify and compare the instances of protected anonymous e-mails versus unprotected anonymous e-mails. But a few common-sense considerations must enter into this calculus. First, given that unprotected commercial spam now constitutes over 80% of all e-mail traffic (Pet. at 4), *any* class of protected e-mails likely will be only a small percentage of e-mails affected by a statute that targets e-mail. But that does not mean that e-mail is not worthy of First Amendment protection. In Virginia's "comparative" analysis, however, this does not matter. Under its view, so long as the relative incidence of protected versus unprotected e-mails is small, a state is free to regulate *all* e-mails in whatever way it chooses without risking a facial challenge. By this logic, a statute that bans *all* e-mail communications would be insulated from facial challenge simply because the vast majority of e-mail is unwanted spam—the baby could be thrown out with the bathwater so long as there was a lot of bathwater. That is neither good sense nor good law.

Second, Virginia ignores the ease with which Code § 18.2-152.3:1's overbreadth could have been cured by Virginia's General Assembly. Here, eliminating most of the statute's problematic overbreadth would have been as simple as limiting Code § 18.2-152.3:1 to *commercial* spam—something that the federal CAN-SPAM Act and nearly every other state anti-spam statute has done.[16] This is not a circumstance where, due to the difficulty of drawing a statutory line between protected and unprotected communications, some protected speech is unavoidable collateral damage. As the Virginia Supreme Court correctly observed, limiting the statute to commercial speech would not have diminished the efficacy of the statute against its true target: commercial spam. (Pet. App. at 24). Indeed, there was absolutely no evidence that bulk *non*-commercial e-mail was a problem that the Virginia General Assembly felt needed to be addressed. (*Id.*). In short, the overbreadth of Code § 18.2-152.3:1's was entirely gratuitous. The Supreme Court of Virginia correctly emphasized this fact in striking the statute down.

Third, Virginia's argument disregards the practical problems raised by cases in which litigants bring facial First Amendment challenges on anonymous-speech grounds. Persons wishing to

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[16] *See supra* note 13. Indeed, now pending before the Virginia General Assembly is House Bill No. 1796, which amends Va. Code § 18.2-152.2 to include a definition for "commercial electronic mail" and which adds § 18.2-152.3:2, a section nearly identical to current § 18.2-152.3:1 but which is limited to commercial electronic mail. The summary of the bill states that "[t]his bill parallels the existing spam law but limits application to commercial electronic mail."

communicate anonymously are, by definition, persons who do not want their affiliation with an article, e-mail, or cause disclosed to the public. Thus it would be nearly impossible for a litigant to locate and identify—let alone present the trial testimony of—a person who wished to communicate anonymously but whose speech was chilled by the statute in question. Yet that is exactly the sort of proof that Virginia demands of Jaynes.

To summarize: *Code* § 18.2-152.3:1 is substantially overbroad, unnecessarily overbroad, and unconstitutionally overbroad. The Supreme Court of Virginia correctly allowed Jaynes to mount a facial First Amendment challenge to it.

CONCLUSION

Because Virginia raises its "comparative analysis" argument for this first time on appeal, because the facial-standing issue—even if adequately preserved—raises no significant new issues worthy of this Court's attention, because the practical effect of the decision below is nil, and because the lower court decided the matter correctly under this Court's settled substantial-overbreadth standard, this Court should deny certiorari.

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COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF THE PETITIONER

In his Brief in Opposition, Jaynes acknowledges that (1) he violated the Virginia Act; (2) the Virginia Act is constitutional as applied to him; and (3) the Virginia Act is constitutional in all but a "small percentage" of its applications. *Br. in Opp.* at 1, 21. This Court has repeatedly held that a First Amendment facial challenge must fail in those circumstances. As recently as last Term, the Court rejected a facial challenge to a statute because "[i]n the vast majority of its applications, th[e] statute raises no constitutional problems whatever." *United States v. Williams*, 128 S. Ct. 1830, 1844 (2008). The Virginia Supreme Court's decision cannot be reconciled with *Williams* or the many other cases requiring that courts assess a statute's "overbreadth . . . in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In its Petition, Virginia pointed to a conflict in approaches used by the lower courts in determining whether a statute is "substantially" overbroad. The Supreme Court of Virginia's approach is diametrically opposed to the approach utilized by the First, Third, Tenth, and, most recently, Sixth Circuits. Given the "substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct," *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), it is vitally important

that the test for determining substantial overbreadth reflect the principles of judicial restraint.

Jaynes does not respond meaningfully to these fundamental points. Instead, he attempts to sow confusion by asserting that Virginia never raised the issue of substantial overbreadth in the lower courts. *Br. in Opp.* 5-7. He insists that there is no real conflict among the lower courts as to how to determine substantial overbreadth. *Br. in Opp.* 7-13. Most remarkably, although he acknowledges that constitutionally "protected e-mails likely will be only a small percentage of e-mails" covered by the Virginia Act, *Br. in Opp.* 21, Jaynes insists that the Virginia Act is substantially overbroad. *Br. in Opp.* 15-23. Jaynes is simply wrong on all three contentions.

I. VIRGINIA ARGUED BELOW THE ISSUE OF SUBSTANTIAL OVERBREADTH AND THE NEED FOR A COMPARATIVE ANALYSIS.

Although Virginia defended the statute on a number of grounds, Virginia expressly argued that there was no substantial overbreadth because the act was constitutional in most circumstances. Brief of Virginia at 34-35, *Jaynes v. Virginia*, 657 S.E.2d 478 (Va. 2008). Virginia argued that:

> The Act is not substantially overbroad. *Most applications of the Act are clearly constitutional.* For example, it is constitutional to apply the Act to unsolicited bulk commercial e-mail.

> Similarly, it is constitutional to apply the Act to unsolicited bulk e-mail that proposes a criminal transaction, that is defamatory, or that contains obscene images. *These legitimate applications—commercial, criminal, defamatory, and obscene—are greater than any unconstitutional applications of the Act.*

Id. at 34 (emphasis added). *See also* Brief of Virginia at 36, *Jaynes v. Virginia,* 634 S.E.2d 357 (Va. Ct. App. 2006) (similar argument in the state intermediate appellate court). In a supplemental letter advising the lower court of this Court's decision in *Williams*, Virginia reiterated the need to compare constitutional applications with unconstitutional applications:

> The second step in the overbreadth analysis asks "whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity." In making such an evaluation, *this Court must recognize that non-commercial unsolicited bulk e-mails that offer or seek to obtain unlawful materials are not constitutionally protected.* Moreover . . . *the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient" to justify facial invalidation.*

Supplemental Authority Letter of May 19, 2008 at 1, *Virginia v. Jaynes*, 666 S.E.2d 303 (Va. 2008) (emphasis added, citations omitted).

Not only did Virginia raise the issue, but the lower court acknowledged the argument. The Supreme Court of Virginia observed that:

> [t]he Commonwealth argues that Code § 18.2-152.3:1 is not substantially overbroad because . . . 'most' applications of its provisions would be constitutional, citing its application to unsolicited bulk commercial e-mail, unsolicited bulk e-mail that proposes a commercial transaction, and unsolicited bulk e-mail that is defamatory or contains obscene messages.

App. 26.

In sum, Virginia pressed the substantial overbreadth issue below—including the need to compare constitutional applications to unconstitutional applications. Jaynes' argument to the contrary is devoid of merit.

II. THE VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS ON SUBSTANTIAL OVERBREADTH.

Jaynes expressly acknowledges that constitutionally "protected e-mails likely will be only a small percentage of e-mails affected" by the Virginia Act. *Br. in Opp.* 21.[1] This point goes to the heart of the

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[1] Consistent with Jaynes' own assessment, the internet service providers note that e-mail spam, *i.e.*, e-mail containing

(Continued on following page)

error committed below. *See Connection Distributing Co. v. Holder*, ___ F.3d ___, ___, 2009 WL 414615 at *16 (6th Cir. 2009) (*en banc*). As this Court explained last Term, if "the vast majority of its applications" raise "no constitutional problems whatever," the statute cannot be substantially overbroad. *Williams*, 128 S. Ct. at 1844.

Jaynes contends that so long as a statute applies to e-mails that are "worthy of First Amendment protection," such as someone who forged or falsified transmission information to disseminate the Federalist Papers via e-mail, the statute is facially unconstitutional. *Br. in Opp.* 21. The lower court shared this misunderstanding of the overbreadth doctrine. This view effectively eviscerates the substantial overbreadth requirement. The "'substantial overbreadth' requirement prohibits a party from leveraging a few alleged unconstitutional applications of the statute into a ruling invalidating the law in all of its applications." *Connection*, ___ F.3d at ___, 2009 WL 414615 at *16. It prevents the invalidation of a statute "where, despite some possibility of impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65 (1984) (citation omitted).

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fraudulent or forged transmission information, is overwhelmingly commercial and is rarely used to convey political or religious speech. *USISPA Amicus Br.* 14-16.

Since "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects." *Williams,* 128 S. Ct. at 1838, the substantial overbreadth requirement limits facial invalidity to those situations where "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801 (1984).

Of course, the litigants may still raise an as-applied challenge to the Virginia Act. *Wisconsin Right to Life, Inc. v. FEC,* 546 U.S. 410, 412 (2006) (per curiam). Such challenges "are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007). Moreover, a defendant may pursue a pre-enforcement *as-applied* challenge. *Id.* at 1638-39.

Jaynes also argues that speech regulations that extend beyond commercial speech may be found to be overly broad "for that reason alone." *Br. in Opp.* 20. Neither case he cites supports this proposition. In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court invalidated the Communications Decency Act because it infringed on a "large amount" of constitutionally protected speech—in marked contrast to the present statute. *Id.* at 874. In *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150 (2002), the Court invalidated an ordinance requiring registration for door-to-door advocacy, holding that the "breadth of

the speech [adversely] affected by the ordinance," combined with a lack of narrow tailoring, were fatal. *Id.* at 164, 168. Far from undermining Virginia's position, these cases support it.[2]

Jaynes contends that Virginia could solve any overbreadth problem by enacting a statute limited to commercial e-mail spam. *Br. in Opp.* 22. This argument ignores the cardinal principle that courts should not "short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). This Court's overbreadth doctrine does not permit courts to strike down statutes that are constitutional in the vast majority of their applications merely because the legislature could draft a better statute.

Contrary to Jaynes' argument, the statute does not threaten anonymous speech on the internet. *Br. in Opp.* at 23. The statute prohibits the "falsification or forg[ery]" of "transmission information or other routing information." Virginia Code § 18.2-152.3:1(A). There is no constitutional right to falsify one's identity in order to circumvent security measures so

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[2] Virginia does not ask for a "bright line" or a "numerical cut off" as Jaynes suggests. *Br. in Opp.* 8 n.6. Rather, Virginia seeks nothing more than to ensure that courts actually undertake a correct assessment of substantial overbreadth.

as to send speech that is unwelcome by the recipients. By analogy, even if someone wishes to deliver political pamphlets, there is no right to print a falsified *delivery slip that causes UPS to deliver the package* at UPS's expense to an unwilling recipient. Moreover, there are many ways besides to communicate anonymously on the internet without falsifying transmission information.

There was no need for the draconian remedy of facial invalidation. Indeed, courts should "try not to nullify more of a legislature's work than is necessary, [because] '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). Virginia's anti-spam statute was the product of a *unanimous* vote by both houses of the Virginia General Assembly.[3] It should not have been invalidated entirely without some assessment of its permissible reach relative to its unconstitutional applications.

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[3] *See* http://leg1.state.va.us/cgi-bin/legp504.exe?031+sum+HB2290. This year, the General Assembly considered and rejected a bill, House Bill 1796, that would have created an *additional* anti-spam statute limited to commercial spam. http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1796.

III. THE CONFLICT AMONG THE LOWER COURTS IS REAL AND HAS DEEPENED SINCE THE FILING OF THE PETITION.

Although Jaynes strains to diminish the conflict among the lower courts, the conflict is real and deep. Whether a statute is deemed substantially overbroad depends upon the approach that the court takes.

The Eighth Circuit, the Supreme Court of Virginia and other courts employ an absolutist approach, finding substantial overbreadth whenever a statute is not written "to prevent only that speech which the government has an interest in restricting." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 541 F.3d 785, 794 (8th Cir. 2008), *pet. for rehearing en banc denied* (Dec. 5, 2008).[4] *See also Hawaii v. Beltran,* 172 P.3d 458, 464 (Haw. 2007).[5] *City of*

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[4] Jaynes incorrectly asserts that *Milavetz* was an as-applied challenge. *Br. in Opp.* 10. The plaintiff in *Milavetz* was making a facial challenge alleging overbreadth. *See Milavetz*, 541 F.3d at 798-99 (Colloton, J., dissenting) (describing the challenge as a facial challenge alleging overbreadth). *See also* United States Petition for Rehearing *En Banc* at 1, *Milavetz,* 541 F.3d 785 (characterizing the Eighth Circuit decision as invalidating "an Act of Congress as facially invalid under the First Amendment."). Since the filing of the Petition, the Fifth Circuit has rejected an overbreadth challenge to the same federal law invalidated as overbroad in *Milavetz*. *See Hersh v. United States ex rel. Mukasey,* 553 F.3d 743, 762-63 (5th Cir. 2008).

[5] Jaynes' erroneously contends that *Beltran* was decided under the Hawaii constitution, *Br. in Opp.* 10. In *Beltran*, the plaintiff alleged that an ordinance and a regulation that governed camping was substantially overbroad in violation of the United States and the state constitution. 172 P.3d at 461-64.

(Continued on following page)

Maquoketa v. Russell, 484 N.W.2d 179, 185-86 (Iowa 1992). Under this approach, a statute—like the Virginia Act—that may be constitutionally problematic in a "few hypothetical situations" is invalidated in all applications. *See Milavetz*, 541 F.3d at 799 (Colloton, J., dissenting).

In contrast, the First, Third, Sixth, and Tenth Circuits use a comparative approach, focusing on "a rough balancing of the number of valid applications compared to the number of potentially invalid applications." *Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977). *See also Borden v. Sch. Dist. of Tp. of East Brunswick*, 523 F.3d 153, 165 (3rd Cir. 2008), *cert. denied*, No. 08-482 (March 2, 2008); *Gibson v. Mayor & Council of Wilmington,* 355 F.3d 215, 226 (3rd Cir. 2004).[6] If "the number of [unconstitutional]

The Hawaii Supreme Court noted in passing that certain cases relied upon by the municipality were distinguishable, and moreover, it was "not bound by the decisions of other courts insofar as greater protection *may be* afforded" by the constitution of Hawaii. *Id.* at 470. The Court ultimately held that the ordinance and the statute were unconstitutional, without limiting its holding to the state constitution. *Id.*

[6] Jaynes notes that two recent opinions of the Third Circuit do not expressly rely on the analytical factors listed in *Gibson* and *Borden*. *Br. in Opp.* 12-13. However, the Third Circuit has not abandoned those factors. Furthermore, the court examined, albeit briefly, the impermissible scope of each measure. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 316, 319 (3rd Cir. 2008) (University's policy against sexual harassment held substantially overbroad because it covered "too much expression that is constitutionally protected."); *ACLU v. Mukasey*, 534 F.3d 181, 207 (3rd Cir. 2008), *cert. denied*, 129

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applications is insubstantial compared to the number of [constitutional] applications," *ACORN v. City of Tulsa*, 835 F.2d 735, 744 (10th Cir. 1987), then there is no substantial overbreadth. *See also Nat'l Advertising Co. v. City and County of Denver*, 912 F.2d 405, 411 (10th Cir. 1990). Under this approach, a statute—like the Virginia Act—that is constitutional in the vast majority of circumstances will survive an overbreadth challenge.

This conflict has deepened since the filing of the Petition. On February 20, 2009, the Sixth Circuit—sitting *en banc*—adopted the comparative approach. *See Connection*, ___ F.3d at ___, 2009 WL 414615 at *12-18. In declining to hold that a federal pornography statute was substantially overbroad, that court observed that "there is little basis for dispute that [the federal statute] complies with the First Amendment in most settings" and that the "'legitimate sweep' of the law represents the vast majority of its applications." *Id.* at ___, 2009 WL 414615 at *13. As the court stressed, "[t]he question is not whether the claimant can imagine some 'overbreadth;' it is whether the claimant can show 'substantial overbreadth.'" *Id.* at ___, 2009 WL 414615 at *14 (emphasis added).

S. Ct. 1032 (2009) (Child Online Protection Act was overbroad because it reached a "large amount" of protected speech).

CONCLUSION

For the reasons stated above, in the Petition itself, and in the various amici briefs supporting Virginia, the Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

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In the
Supreme Court of the United States

THE COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

JEREMY JAYNES,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Virginia

BRIEF OF THE STATES OF ALABAMA, COLORADO, FLORIDA, HAWAII, IDAHO, INDIANA, KENTUCKY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When confronted with a claim that a state statute is substantially overbroad and, thus, facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications? *See* Pet. at i.

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INTEREST OF AMICI CURIAE[1]

Spam is a menace to the Nation's electronic communications networks. It accounts for over 80% of all e-mail traffic[2] and in any given year costs American businesses billions of dollars in network expenses and lost productivity.[3] States are not immune from this phenomenon – and in fact may be even more susceptible to it.[4] For that reason, the amici States eagerly support Virginia's request that this Court restore its common-sense anti-spam provision, Va. Code § 18.2-152.3:1.

But this case is about much more than unsolicited bulk e-mail. On a broader scale, it is about the cavalier *manner* in which the lower court tossed aside Virginia's anti-spam statute. From its unsupported assumption that the anonymous "Publius" would have run afoul of the statute were he to publish The Federalist Papers today via spam, the Virginia Supreme Court concluded that the

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[1] The parties' counsel of record received timely notice of the *amici curiae*'s intent to file this brief under Supreme Court Rule 37.2(a).

[2] *See* MessageLabs, *MessageLabs Intelligence: 2008 Annual Security Report* 5 (2008), http://www.messagelabs.com/mlireport/MLIReport_Annual_2008_FINAL.pdf (last visited Jan. 8, 2009).

[3] *See* S. Rep. No. 108-102, at 7 (2003).

[4] *See* Nat'l Assoc. of State Chief Info. Officers, *Welcome to the Jungle: The State Privacy Implications of Spam, Phishing and Spyware* 4 (2005), http://www.nascio.org/publications/documents/NASCIOSpamBriefWelcometotheJungle.pdf (noting that states' large number of e-mail addresses, consistent e-mail naming conventions, and Internet publication of employees' e-mail addresses make states "especially attractive spammer targets") (last visited Jan. 7, 2009).

amount of protected speech made criminal by the statute was "substantial" and invalidated the statute in its entirety. *See Jaynes v. Virginia*, 666 S.E.2d 303, 314 (Va. 2008). It did this without one shred of evidence about how often spam really is used to engage in political or religious speech, and even though Jaynes admitted that Virginia has every right to criminalize the particular conduct for which he was convicted. This case, then, is about a way of applying the First Amendment overbreadth doctrine that is itself overbroad.

States are interested for at least two reasons. First is their strong interest in ensuring that the enactments of their legislatures are not so casually discarded. Time and time again, this Court has emphasized the deference owed to these "embodiments" of the popular will. *E.g., Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (warning against short-circuiting "the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution"); *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 1228 (1998) (noting that the canon of avoiding constitutional doubt is followed "out of respect" for the legislative branch); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975) (embracing the "proper—and properly limited—role of the courts in a democratic society"); *Barrows v. Jackson*, 346 U.S. 249, 256-57, 73 S. Ct. 1031, 1035 (1953) (expressing hesitance to "frustrate the expressed will of . . . the state legislatures"). Indeed, this deference helps explain why in more recent years this Court has "expressed increasing skepticism of facial challenges" like the one presented here. *Warshak v. United States*, 532

F.3d 521, 529 (6th Cir. 2008) (en banc). Invalidating a statute is serious business, and this Court should reserve a wide berth in its certiorari jurisdiction for reviewing such a result.

The amici States find a second and even stronger interest in avoiding the "substantial social costs," *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 2197 (2003), and "obvious harmful effects," *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008), created by the overbreadth doctrine when it justifies releasing criminals who cannot themselves claim any constitutional protection for their actions. When a state statute is invalidated on overbreadth grounds, those "social costs" are borne by the states, and the "obvious harmful effects" are felt in the states. And while today's freed criminal may be "only" an overly prolific e-mailer, tomorrow's may be a stalker, *e.g.*, *City of Montgomery v. Zgouvas*, 953 So. 2d 434 (Ala. Crim. App. 2006), a purveyor of terrorist threats, *e.g.*, *Lansdell v. State*, No. CR-05-0243, 2007 WL 2811969 (Ala. Crim. App. Sept. 28, 2007), or worse, *see, e.g.*, *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), *rev'd*, *Williams*, 128 S. Ct. at 1847 (promoter of child pornography).

The states have a broad responsibility to protect the health, safety, and welfare of their citizens, and must legislate in an endless variety of areas that at least arguably implicate the First Amendment. When state statutes are judged by the courts for overbreadth, the State amici have an obvious interest in finding an overbreadth standard which is clear and which, except in the most extreme cases, will allow the constitutional portions of their statutes to be enforced.

REASONS FOR GRANTING THE WRIT

In barring all enforcement of a statute that maybe, arguably, perhaps prohibited some protected speech, the Virginia Supreme Court turned this Court's First Amendment overbreadth doctrine on its head. The court considered a statute that prohibited Jaynes from falsifying electronic information to avoid a protocol that blocked unsolicited e-mail. *Jaynes v. Virginia*, 666 S.E.2d 303, 305-06 (Va. 2008) (reprinted at Pet. App. 5). Jaynes conceded that there was no First Amendment problem with the statute as applied to his own conduct of flooding inboxes with unwanted *commercial* spam. *Id.* at 313 (App. 24, 40-41). However, the court held that the statute would be unconstitutional if it were applied to someone who, hypothetically, wished to falsify electronic information in order to trick computer servers into accepting spam with a political or religious message. *Id.* at 314 (App. 26-27). The court did so without any showing that such a person in fact exists and without any comparison of the statute's legitimate and (allegedly) illegitimate sweep. *Id.*

In section I, the amici States will argue that this case raises issues of national importance worthy of certiorari review: This Court's overbreadth cases recognize that importance of deferring to legislatures by reserving facial challenges to cases where the overbreadth is "substantial;" states are frequently required to defend statutes on overbreadth grounds; and spam itself is an important and costly national problem. In sections II and III, respectively, the amici States will argue that this Court should grant the petition because the Virginia Supreme Court failed to follow this Court's cases on an important issue and because the court's decision deepens a split in authority.

I. This Case Raises Issues of National Importance.

A. This Court's Overbreadth Doctrine Recognizes the Importance of Deferring to Legislatures By Reserving Facial Challenges to the Most Extreme Cases.

If a statute by its terms prohibits both unprotected speech and protected speech, it of course may be unconstitutional "as applied" to the person engaging in speech protected by the First Amendment. In a successful as-applied challenge, the law is declared unconstitutional in the circumstances of the case, and the legitimate reach of the statute remains intact. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 2223 (1979). However, if the reach into protected speech is great enough, the statute is facially invalid and may not be applied in any circumstances, even against someone whose First Amendment rights have not been violated. *See United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).

While facial challenges based on overbreadth serve a purpose to protect the rights of persons not before the Court, there are significant costs to the "strong medicine" of invalidating a law in all applications. *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2108, 2916 (1973)). This Court has therefore limited facial challenges for overbreadth to those cases where the overbreadth is *substantial*:

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all

> enforcement of that law – particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong medicine" of overbreadth invalidation.

Virginia v. Hicks, 539 U.S. 113, 119-120, 123 S. Ct. 2191, 2197 (2003) (quoting *Broadrick*, 413 U.S. at 613, 615, 93 S. Ct. at 2916-17). *See also Osborne v. Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 1697 (1990) ("Even where a statute at its margins infringes on protected expression, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." (citations and internal quotation marks omitted)).

The importance of this issue – the proper test for substantial overbreadth – is shown by this Court's own recognition of the "substantial social costs," *Hicks*, 539 U.S. at 119, 123 S. Ct. at 2197, and "obvious harmful effects," *Williams*, 128 S. Ct. at 1838, created when a statute with at least some lawful applications is struck down in full because it also has some unlawful applications. It is thus

important that the overbreadth standard ensures that facial challenges are reserved for appropriate cases.

"[T]he First Amendment needs breathing space," *Broadrick*, 413 U.S. at 611-12, 93 S. Ct. at 2915, but so do state legislatures. State statutes cannot withstand an overbreadth test that requires perfect alignment with the First Amendment (in all real *and* imaginary circumstances) before it can be enforced in any application. Wherever possible, overbreadth should be cured by as-applied challenges, so that necessary laws are not invalidated in full. Because of the deference owed to legislatures and the significant costs of the overbreadth doctrine, the test for whether to invalidate a state statue is always one of national importance.

B. Overbreadth Challenges Are Made With Ever-Increasing Frequency To An Ever-Increasing Range of Laws.

It is important that the overbreadth doctrine be limited, because overbreadth *challenges* seem to have no limit. Overbreadth has become a stock defense in criminal cases. Unlike statutes that deal with pornography, nude dancing and outdoor signs, and which constantly are being challenged as overbroad, some categories of laws seem at first blush not to lend themselves to such a challenge. However, new means and opportunities of expression, coupled with the ingenuity of defendants to tie criminal statutes to some type of speech, force states to defend overbreadth challenges with growing frequency.

A case in point is Delaware's very sensible statute prohibiting patient abuse, Del. Code tit. 16, § 1136(a). Because that statue reaches emotional and verbal abuse, it is ripe for an overbreadth challenge

in today's environment. In one prosecution, a defendant charged under the statute engaged in deplorable physical abuse of a patient. The statute was clearly constitutional as applied to her, yet she argued that the entire statute should be invalidated because it might cover some protected speech. *Robinson v. State*, 600 A.2d 356, 362 (Del. 1991). Fortunately, the court applied this Court's precedents correctly, held that the statute did not prohibit a *substantial* amount of protected speech, and left intact the lawful applications of the statute. *Id.* at 364. Had the court used the test that was applied to the Virginia anti-spam statute, the outcome is not so certain.[5]

Countless other state statutes and ordinances have been challenged on overbreadth grounds in recent years. That many of the challenges have been unsuccessful (so far) is beside the point: With a firm overbreadth test, states have little to fear from fringe overbreadth challenges, and legislatures are kept in check by as-applied challenges. With an eroded test, however, where a "fanciful hypothetical" is sufficient to invalidate a law, *Williams*, 128 S. Ct. at 1843, virtually any state statute is vulnerable.

As shown below, practically any state or local law can be challenged on overbreadth grounds, even those laws without an obvious connection to speech. The following list of statutes that have faced recent

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[5] In its petition, Virginia discusses other recent overbreadth challenges to state statutes and focuses on those where courts use a weakened overbreadth standard, driven by hypotheticals, similar to that used by the Supreme Court of Virginia. Pet. at 26-27. The amici States note that none of those statutes survived the weakened test.

overbreadth challenges demonstrates the depth of the problem for the States:

- **Aiding a minor in obtaining abortion without parental consent.** *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 741-42 (Mo. 2007) (upheld on limiting construction).
- **Bomb Scares.** *In re Robert T.*, 746 N.W.2d 564, 568 (Wis. Ct. App. 2008) (upheld).
- **Campaign finance disclosures.** *Colorado Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1016 (D. Colo. 2005) (rejecting overbreadth argument), *aff'd sub nom. Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007).
- **Campaigning at voting sites.** *Anderson v. Spear*, 356 F.3d 651, 661 (6th Cir. 2004) (striking 500-foot no-campaign zone as overbroad).
- **Child endangerment (failing to report abuse).** *State v. Wilson*, 987 P.2d 1060, 1067 (Kan. 1999) (upheld).
- **Communications fraud.** *State v. Mattinson*, 152 P.3d 300, 303 (Utah 2007) (upheld).
- **Conflict of interest by public officials.** *Commonwealth v. Habay*, 934 A.2d 732, 739 (Pa. Super. Ct. 2007) (upheld), *appeal denied*, 954 A.2d 575 (Pa. 2008).
- **Criminal transmission of HIV.** *State v. Musser*, 721 N.W.2d 734, 746 (Iowa 2006) (upheld).
- **Disorderly conduct on Capitol grounds** (to intentionally interfere with Congress). *Smith-Caronia v. United States*, 714 A.2d 764, 767 (D.C. 1998) (upheld).

- **Drug-induced homicide.** *People v. Boand*, 838 N.E.2d 367, 398-99 (Ill. App. Ct. 2005) (upheld).
- **Driving under the influence.** *State v. Poshka*, 109 P.3d 113, 116 (Ariz. Ct. App. 2005) (upheld). *See also State v. Andrews*, 730 N.W.2d 416, 419-20 (S.D. 2007) (rejecting an overbreadth challenge to a statute proscribing *boating* under the influence).
- **English-only Requirement for State Business.** *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 214 n.194 (Alaska 2007) (overbreadth challenge rejected). *Cf. id.* at 215 (Bryner, C.J., dissenting) (arguing that the statute should have been struck down as overbroad).
- **Extortion.** *Pauling v. McKenna*, No. C04-2203C, 2005 WL 3132213, at *4 (W.D. Wash. Nov. 22, 2005) (unreported) (statute upheld); *People v. Feldman*, 791 N.Y.S.2d 361, 382-83 (N.Y. Sup. Ct. 2005) (upheld).
- **Failing to obey a police officer.** *Commonwealth v. Abramms*, 849 N.E.2d 867, 876-77 (Mass. App. Ct. 2006) (upheld on limiting construction). *Cf. id.* at 880 (Berry, J., dissenting) (arguing that the statute should have been struck down as overbroad); *State v. Illig-Renn*, 142 P.3d 62, 69 (Or. 2006) (upheld); *State v. Kaiser*, 65 P.3d 463, 468 (Ariz. Ct. App. 2003) (upheld).
- **Harboring a dangerous dog.** *McNeely v. United States*, 874 A.2d 371, 380-81 (D.C. 2005) (upheld).
- **Identity theft.** *State v. Porter*, 108 P.3d 107, 111 (Or. Ct. App. 2005) (upheld on limiting construction).

- **Improper recruiting of high school athletes by college coach.** *Rottmann v. Pennsylvania Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922, 933 (W.D. Pa. 2004) (agency rule not overbroad because "[t]here are a substantial number of ways that the Rule can be validly applied.")
- **Intentionally causing another to make false statements when collecting signatures on a petition.** *Dermer v. Miami-Dade County*, No. 07-21308-CIV, 2008 WL 2955152 (S.D. Fla. Aug. 1, 2008) (struck as overbroad).
- **Jury tampering.** *Turney v. State*, 936 P.2d 533, 541 (Alaska 1997) (upheld on limiting construction).
- **Methamphetamine production.** *Varble v. Commonwealth*, 125 S.W.3d 246, 256 (Ky. 2004) (upheld); *People v. Bradford*, No. No. 273540, 2007 WL 4355426, at *7 (Mich. Ct. App. Dec. 13, 2007) (unreported) (statute upheld); *State v. Kouns*, No. M2006-02788-CCA-R3-CD, 2008 WL 4830793, at *9 (Tenn. Crim. App. Nov. 5, 2008) (statute upheld).
- **Mob action statute** (prohibiting assembly of two or more to do an unlawful act). *People v. Williams*, 838 N.E.2d 275, 281 (Ill. App. Ct. 2005) (citing *Landry v. Daley*, 280 F. Supp. 2d 938 (N.D. Ill. 1968), *rev'd on other grounds sub nom. Boyle v. Landry*, 401 U.S. 77, 91 S. Ct. 758 (1971)) (affirming dismissal of complaint when state was subject to federal court injunction against enforcing statute on grounds that it was overbroad).

- **Municipal employee campaigning for municipal office.** *DeAscentis v. Pine*, 729 A.2d 715, 717-18 (R.I. 1999) (action dismissed as moot).
- **Open Meetings.** *Rangra v. Brown*, No. P-05-CV-075, 2006 WL 3327634, at *7 (W.D. Tex. Nov. 7, 2006) (statute upheld).
- **Panhandling (aggressive).** *People v. Barton*, 861 N.E.2d 75, 75-76 (N.Y. 2006) (upheld).
- **Police officer associating with felons.** *Bailey v. City of National City*, 226 Cal. App. 3d 1319, 1332-33 (Cal. Ct. App. 1991) (dismissed on standing grounds).
- **Promoting prostitution.** *Allen v. Stratton*, 428 F. Supp. 2d 1064, 1071-72 (C.D. Cal. 2006) (California statute upheld); *People v. Levels*, No. F052369, 2008 WL 2486866, at *10 (Cal. Ct. App. June 23, 2008) (unreported) (claim rejected for lack of standing); *State v. Pegouskie*, 113 P.3d 811, 820 (Haw. Ct. App. 2005) (upheld); *State v. Wong*, No. M2003-00504-CCA-R3-CD, 2004 WL 1434384, at *13 (Tenn. Crim. App. June 25, 2004) (unreported) (statute upheld).
- **Protesting at burial services or funeral processions during military funerals.** *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 620 (N.D. Ohio 2007) ("floating buffer zone" provision struck as overbroad and severed), *aff'd in part sub nom. Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (no cross-appeal of overbreadth ruling); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 997 (E.D. Ky. 2006) (300-foot buffer between protesters and bereaved family members of deceased soldiers held overbroad).
- **State employees using public resources for political purposes.** *Siplin v. State*, 972 So. 2d

982, 989-90 (Fla. 5th Dist. Ct. App. 2007) (upheld on limiting construction); *Herbert v. Washington State Pub. Disclosure Comm'n*, 148 P.3d 1102, 1111-12 (Wash. Ct. App. 2006) (upheld).

- **Sexual misconduct/abuse of trust.** *People v. Bayer*, 756 N.W.2d 242, 250-53 (Mich. Ct. App. 2008) (sexual relations between psychiatrist and patient) (statute upheld), *vac. in part on other grounds*, 756 N.W.2d 77 (Mich. 2008); *State v. McKenzie-Adams*, 915 A.2d 822, 833 n.10 (Conn. 2007) (sexual relations between school employees and students) (statute upheld), *cert. denied*, 128 S. Ct. 248 (U.S. 2007); *State v. Bussmann*, 741 N.W.2d 79, 84 n.2 (Minn. 2007) (sexual misconduct by member of the clergy) (facial challenge rejected).
- **Telephone harassment.** *Vines v. City of New York*, 305 F. Supp. 2d 289, 300-02 (S.D.N.Y. 2003) (struck as overbroad), *rev'd in part on other grounds*, 405 F.3d 115 (2d Cir. 2005). *But see People v. Cooper*, 781 N.Y.S.2d 201 (N.Y. Dist. Ct. 2004) (refusing to follow *Vines* and holding that statute was not unconstitutional).
- **Telephone Solicitations** ("No-call" lists). *Nat'l Coal. of Prayer, Inc. v. Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at *4-*5 (S.D. Ind. Sept. 2, 2005) (unreported) (statute upheld), *aff'd*, 455 F.3d 783 (7th Cir. 2006).
- **Terrorist threats.** *Lansdell v. State*, No. CR-05-0243, 2007 WL 2811969, at *3 (Ala. Crim. App. Sept. 28, 2007) (upheld).
- **Theft by Deception.** *State v. Trackwell*, No. A-01-1174, 2003 WL 22231883, at *2 (Neb. Ct. App. Sept. 30, 2003) (unreported) (claim of overbreadth not reached on appeal).

- **Unauthorized practice of medicine.** *People v. Rogers*, 641 N.W.2d 595, 610 (Mich. Ct. App. 2001) (upheld); *State v. Hoffman*, 733 P.2d 502, 505-06 (Utah 1987) (upheld). *See also State v. Wees*, 58 P.3d 103, 107 (Idaho Ct. App. 2002) (statute prohibiting the unauthorized practice of law upheld because it "plainly encompasses a wide range of constitutionally proscribable conduct.").
- **Witness tampering.** *People v. Butler*, 873 N.E.2d 480, 483-84 (Ill. App. Ct. 2007) (upheld), *appeal denied*, 879 N.E.2d 933 (Ill. 2007); *People v. Bennett-Gibson*, 851 A.2d 1214, 1224 (Conn. App. Ct. 2004) (upheld).
- **Workers' Compensation fraud.** *Tauese v. Hawaii Dep't of Labor & Indus. Relations*, 147 P.3d 785, 812 n.27 (Haw. 2006) (upheld).

States are constantly required to defend statutes, of all varieties, against claims that a hypothetical person will be chilled by the statute's allegedly impermissible reach. It is a matter of national importance, then, that the test for substantial overbreadth be clear and that, except in the most extreme cases, the constitutional portions of the statute remain in effect.

C. Spam is a Costly National Problem Requiring Regulation by the States, and Spam Violates the Sanctity of the Home.

Any e-mail user is woefully familiar with spam. As observed in the first paragraph of this brief, some reports estimate that more than 80% of all e-mail is spam. Other estimates are even higher:

> By June 2008, research reveals that the level of spam had risen to 96.5% of all business e-

> mail. Having risen from a figure of 92.3% in the first three months of the year, corporations are now facing the fact that only one in 28 e-mails is legitimate.

Press Release, Sophos Inc., Sophos Report Reveals Rising Tide Of Spam In April-June 2008 (July 15, 2008), http://www.sophos.com/pressoffice/news/articles/2008/07/dirtydozjul08.html (last visited Jan. 8, 2009).[6]

Unlike other forms of unsolicited speech such as junk mail, where the *sender* bears the costs, the cost of spam is largely borne by the recipient. Internet service providers (ISP's) work to block most spam, the cost of which is passed on to users, and there is productivity cost in deleting unwanted spam and searching for legitimate e-mails in the ocean of the unwanted.[7] For 2007, one group estimates the cost of spam world-wide to be $100 billion, "of which $35

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[6] One group estimates that users world-wide send 210 billion e-mails per day. Press Release, The Radicati Group, Inc., The Radicati Group, Inc., Releases Q2 2008 Market Numbers Update (August 4, 2008), http://www.radicati.com/?p=638 (last visited Jan. 6, 2009). Assuming (conservatively) that 85% of those e-mails are spam, spam is sent at a rate of 123,958,333 unsolicited e-mails *per minute*.

[7] In passing the CAN-SPAM Act, Congress found that "[t]he receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both." CAN-SPAM Act of 2003, § 2, 15 U.S.C. § 7701(3). The California Legislature likewise found that "[t]he 'cost shifting' from deceptive spammers to Internet business and e-mail users has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per minute cellular phone." Cal. Bus. & Prof. Code § 17529(h).

billion [was borne] in the USA alone." Ferris Research, Industry Statistics, http://www.ferris.com/research-library/industry-statistics/ (last visited Jan. 8, 2009).

As Virginia points out in its petition, many states have legislation addressing the problem of spam, with some statutes targeting commercial spam only and some targeting *all* unsolicited e-mail. Pet. at 28-29. The amici States note further that several States, whether addressing all spam or just commercial spam, have statutes that focus on the same problem the Virginia General Assembly tried to address here: spammers falsifying their electronic "signatures" in order to deceive an ISP's spam filters. One example is Connecticut's statute, which makes it illegal to

> [f]alsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

Conn. Gen. Stat. § 53-451(b)(7). Similar statutes include Colo. Rev. Stat. § 6-1-702.5; Del. Code Ann. tit. 11, § 937; 720 Ill. Comp. Stat. 5/16D-3; Iowa Code § 716A.2(1)(a); N.C. Gen. Stat. § 14-458(a); Ohio Rev. Code Ann. § 1307.64(H); 18 Pa. Cons. Stat. Ann. § 7661(a)(1); R.I. Gen. Laws §11-52-4.1(a)(7); and Tenn. Code Ann. § 39-14-603(a). The number of states addressing the issue is evidence that the problem is a national one meriting review by this Court.

The distinction drawn by the Virginia Supreme Court – that the statute in question prohibited *all*

falsified spam, and not just falsified *commercial* spam – does nothing to lessen the issue's importance. That distinction evaporates when the question is one of speech forced upon its audience: "[N]o one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S. Ct. 1484, 1491 (1970). Plus, even if commercial speech does not enjoy quite the protection of noncommercial speech, commercial speech is not wholly unprotected. Even statutes targeting only commercial e-mails are vulnerable to an overbreadth challenge.

This Court has recognized that the First Amendment permits laws that limit "forced" speech, whether or not the speech is commercial. In *Rowan*, this Court approved a statute allowing mail customers to opt out of receiving junk mail. *Id.* As one Justice noted, the Court's interpretation of the statute was broad enough to apply to "political, religious, or other materials." *Id.* at 741, 90 S. Ct. at 1493 (Brennan, J., concurring). Unwanted speech, commercial or not, can be regulated to a greater extent than the same speech in a voluntary environment:

> One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the state may legislate to protect, is an ability to avoid intrusions. Thus we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Frisby v. Shultz, 487 U.S. 474, 484-85, 108 S. Ct. 2495, 2502 (1988) (citations omitted).

Even if a person can check his e-mail from any computer, an e-mail account is personal space, like the home, and states can legislate to protect it. The First Amendment allows statutes that prohibit a company from sending unwanted text messages to a cell phone. *E.g., Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831, 842-43 (Ariz. Ct. App. 2005) (considering the Telephone Consumer Protection Act, 47 U.S.C. § 227). It allows statutes that prohibit unsolicited advertising facsimiles. *Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296, 323-24 (Cal. Ct. App. 2003). It allows enforcement of a "do-not-call" list, even to third-party fundraisers calling on behalf of tax-exempt charities. *Nat'l Coal. of Prayer v. Carter*, 455 F.3d 783, 792 (7th Cir. 2006). In the same manner, it allows a statute that prohibits a person from falsifying his identity to send an unwanted e-mail, whether he is stuffing in-boxes with advertisements or, assuming this is actually occurring, with political or religious views. To argue to the contrary is akin to arguing that a person has a First Amendment right to bring his soap box or pulpit into another's living room, and to do so under false pretenses.[8]

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[8] Even if there is a First Amendment right to lie about your identity in order to send an unwanted political or religious e-mail, that is only part of the analysis. There is still the question of whether such "protected" speech is substantial in relation to the *unprotected* speech, such as Jaynes', that is covered by the statute. *Hicks*, 539 U.S. 113 at 119-120, 123 S. Ct. at 2197; *Broadrick*, 413 U.S. at 613-15, 93 S. Ct. at 2917-18. That is a question the Virginia Supreme Court failed to ask.

II. The Virginia Supreme Court's Decision Contradicts This Court's Test For Determining Substantial Overbreadth.

A hypothetical political spammer was enough, in the Virginia Supreme Court's view, to show that the statute was "substantially overbroad" and to invalidate the statute in *all* applications. However, that is not enough under this Court's decisions to make a successful facial challenge. This Court should grant the petition to reinstate a state statute that is constitutional in at least the great majority of applications, and to strengthen an overbreadth test that will be applied over and over again as more state statutes are challenged as overbroad.

Admittedly, a notion such as substantial overbreadth "is not readily reduced to an exact definition." *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800, 104 S. Ct. 2118, 2126 (1984). This Court has given guidance, though, making clear that the abbreviated analysis used by the Virginia Supreme Court is insufficient: "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* Rather, "there must be a *realistic* danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* at 801, 104 S. Ct. at 2126 (emphasis added).

Thus, in *Virginia v. Hicks*, it was not enough for Hicks to show that a trespass policy may possibly have some impermissible application. Hicks bore the "burden of demonstrating, 'from the text of [the law] *and from actual fact*,' that substantial overbreadth

exist[ed]." *Hicks*, 539 U.S. at 122, 123 S. Ct. at 2198 (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234 (1988)) (emphasis added). Hicks lost, not because he failed to devise a hypothetical or two, but because he "failed to demonstrate that [a 'no-return'] notice would even be given to anyone engaged in constitutionally protected speech." *Id.* Moreover, within the law's legitimate reach, it applied to "a group that would seemingly far outnumber First Amendment speakers." *Id.* at 123, 123 S. Ct. at 2199.

The Virginia Supreme Court did not hold Jaynes to the same standard this Court required of Hicks. The court concluded that "were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute." 666 S.E.2d at 314. Claiming this was not a "fanciful hypothetical," *id.* (quoting *Williams*, 128 S. Ct. at 1843), the court invalidated the statute in all applications.

The amici States do not concede that the Virginia statute is unconstitutional as applied to the hypothetical political or religious spammer. Such a person, after all, must have falsified his electronic identification to fall within the statute's reach, so what is prohibited is not the message but a dishonest transmission of the message. *See Williams*, 128 S. Ct. at 1842 (holding that a pandering provision was not unconstitutionally overbroad when it did not, in fact, bar protected speech). The Virginia statute does not apply to Alexander Hamilton publishing under the "Publius" pseudonym; it applies to Alexander Hamilton falsely claiming to be Patrick Henry. To give legitimacy to the hypothetical assumes, moreover, that there is any merit at all to

the notion of spammers using falsified unsolicited e-mails to do anything except to sell goods or push fraudulent schemes, or that in-boxes are being clogged with political discourse alongside the offers for miracle drugs and penny-stock tips.[9]

Be that as it may, and even assuming that the statute bars some protected speech, it does not follow that the statute is facially invalid. The critical flaw in the Virginia Supreme Court's reasoning is in what it did *not* ask: How much protected speech is proscribed, as compared to unprotected speech? Are there really would-be political spammers? If there is such a thing as religious or political spam, is its volume substantial as compared to the billions of "commercial" spam sent every hour? The answers to these questions would have required that the statute be upheld and that Jaynes' conviction be affirmed. Ignoring these questions led the court to wipe off the books a statute with an indisputably legitimate reach – one the people's representatives enacted to address real societal problems.

A test for overbreadth limited only by the imagination of lawyers and judges is no test at all.

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[9] Indeed, it is difficult to imagine something as important as The Federalist Papers being published by bulk e-mail, competing for attention with the vulgar messages of conventional spam. Obviously, there was nothing like e-mail in the Eighteenth Century, but the methods used then – the tried-and-true pamphlet and letter to the editor – are still available today. Moreover, those wishing to take advantage of modern technology can (and do) publish anonymously via web sites, blogs, message boards, *legally*-transmitted e-mails, and other internet platforms. To be blunt, reversing the Virginia Supreme Court here, and allowing states to prohibit falsifying one's identity to send spam, is unlikely to hinder the next revolution.

Just as "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question,'" *Grayned v. City of Rockford*, 408 U.S. 104, 111 n.15, 92 S. Ct. 2294, 2301 n.15 (1972), a "fertile legal imagination" can always come up with some way that a statute impacts protected speech.

III. The Virginia Supreme Court's Decision Deepens a Conflict of Authority.

Finally, the amici States agree that there is a conflict of authority among the lower appellate courts concerning the proper application of the test for substantial overbreadth.

The amici States add only that while this Court's decisions on overbreadth have been clear, further clarification is needed with respect to what overbreadth is "substantial." We favor an approach that is more objective, such as that used by the Third Circuit. That Court measures "(1) the number of valid applications, (2) the historic or likely frequency of conceivably impermissible applications, (3) the nature of the activity or conduct sought to be regulated, and (4) the nature of the state interest underlying the regulation." *Borden v. Sch. Dist.*, 523 F.3d 153, 165 (3rd Cir. 2008) (quotation marks and citation omitted).

If this Court was to endorse a test such as that used by the Third Circuit, it would resolve the current split between that court (and others with similar tests) and those that measure "substantial overbreadth" by simply considering whether there is a conceivable impermissible application. If this Court was to endorse such a test, there would be little danger that the amici States' statutes would be

invalidated in their entirety simply because a judge or lawyer thought up a "fanciful hypothetical."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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No. 08-765

IN THE
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COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When confronted with a claim that a statute is substantially overbroad and thus facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications?

2. May a state, consistent with the First Amendment, prohibit the deliberate falsification of electronic mail transmission or routing information for unsolicited bulk email?

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1999); *McConnell v. FEC*, 540 U.S. 93 (2003). The decision of the state supreme court in this case, however, represents a serious distortion of free speech jurisprudence.

The ACLJ has several interests at stake in this case. As an employer with staff who use email, the ACLJ supports the efforts of Virginia to eliminate falsified email spam, the processing of which burdens servers and wastes staff time. As an organization that sends out legitimate email, the ACLJ supports the efforts of Virginia to eliminate abusive bulk emails that, both by sheer number and by their unwantedness, detract from the effectiveness of legitimate emails. And as an organization employing attorneys who regularly litigate First Amendment issues, the ACLJ has a keen interest in the proper

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. S. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

development of free speech jurisprudence.

SUMMARY OF ARGUMENT

The First Amendment does not confer a constitutional right to falsify the routing information for unsolicited bulk email. Such deliberate attempts at deception do not fall within the proper scope of the right to anonymous speech. The state supreme court therefore erred when it held that Virginia's statute prohibiting such falsification is unconstitutionally overbroad.

ARGUMENT

This case merits review both because of the immensely practical nature of the matter at hand -- battling the flood of email spam -- and the great importance of the First Amendment questions at stake.

The Supreme Court of Virginia erroneously struck down, on its face, a Virginia statute prohibiting the falsification of unsolicited bulk email transmission information. In so holding, the court below committed two fundamental errors.

First, the court held that the Free Speech Clause of the First Amendment confers a right to falsify bulk email routing information where -- unlike the facts in this case -- the sender is transmitting "political, religious, or other expressive [noncommercial] speech." Pet. App. 26. This is wrong. As explained below, there is no right deliberately to falsify sender information for unsolicited bulk email.

Second, the state supreme court held that, because, in its view, the Virginia statute applied unconstitutionally to this hypothetical subset of noncommercial

cases, the statute was therefore facially unconstitutionally overbroad. Pet. App. 25-27. This is wrong as well, as it replaces the requirement that a challenger show "substantial overbreadth" with a requirement that he merely identify "a conceivable unconstitutional application."

The Commonwealth of Virginia in its petition has ably addressed the lower court's failure to engage in proper overbreadth analysis. Virginia contends -- correctly -- that overbreadth analysis requires a court to compare the *constitutional* and *unconstitutional* scope of the challenged statute to determine whether the asserted overbreadth is substantial compared with the statute's legitimate scope. Pet. at 16-17. That comparison, however, is only necessary if the statute actually has some unconstitutional applications. Hence, the question Virginia presents fairly includes the predicate question whether the statute in fact has unconstitutional applications. S. Ct. R. 14.1(a). In this brief, amicus will address this predicate, foundational error, namely, the inaccurate conclusion that there is a First Amendment right to falsify sender information for unsolicited bulk email.[2]

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[2]As noted in the text, this predicate question is "fairly included" in the question Virginia sets forth in its petition. However, because correct resolution of this predicate question would entirely dispose of the case, amicus suggests that this Court both grant review and expressly add, as a separately listed question, the second "Question Presented" set forth in this amicus brief. This would highlight the significance of this important sub-issue.

THE FIRST AMENDMENT DOES NOT CONFER A RIGHT TO FALSIFY BULK EMAIL TRANSMISSION INFORMATION.

An essential premise of the decision below was the lower court's holding that it would be unconstitutional to forbid the deliberate falsification of unsolicited bulk email transmission information as to noncommercial messages. This holding represents a gross distortion of First Amendment jurisprudence. The court below was wrong and should be reversed.

Errors often have a kernel of truth that gives them a degree of plausibility. Here, the state supreme court invoked the genuine, and genuinely important, right to engage in anonymous political, religious, and other noncommercial speech. Pet. App. 23. That right, however, has no proper application in this context.

The First Amendment right to free speech shelters the anonymous pamphleteer. *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-67 (2002). The right to free speech also protects the anonymity of those who engage in expressive association. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). In this way the First Amendment safeguards those who communicate unpopular messages, or who unite to further unpopular ideas, from "threats," "hostility," and "reprisals," *Bates*, 361 U.S. at 524.

None of these cases, however, involve *deliberate deception*. It is one thing to hand out an unsigned pamphlet, but quite another falsely to sign another's

name to it.

This Court's anonymous speech and association cases in no way imply a First Amendment right to falsify "caller i.d." telephone transmissions, to mislabel FedEx sender information, or to trick a cell phone into sounding a ringtone that falsely denotes a familiar caller. The court below therefore erred by reading these cases to create a First Amendment right to tamper deceptively with bulk email transmission information. Such activities do not implicate the "right to anonymous speech," and to say so trivializes that important right.

The court below gave great weight to the fact that private internet protocol (IP) arrangements require someone obtaining an IP address or domain name to "provide identifying contact information" to the registering organization, reasoning that "the only way such a speaker can publish an anonymous email is to enter a false IP address or domain name." Pet. App. 22-23 & n.11. But this logic is specious. First, the private IP rules do not constitute state action, and thus can no more violate the First Amendment than would a private club's requirement that its members provide identifying information upon joining. Second, the lower court's reasoning proves far too much, as it would equally argue for a constitutional "right" to provide false identifying information to the private registering organization upon setting up an email account or domain name in the first place.

The lower court invoked the example of using pen names in the Federalist Papers. Pet. App. 26-27. But the question here is not the use of a *nom de plume*, but more akin to "Brutus" claiming a First Amendment right to submit an article using the *false* pen name "Publius."

In short, the state supreme court "has attempted to stretch . . . First Amendment doctrines well beyond the sort of activities these doctrines protect." *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006).

This Court should grant review and reverse the judgment below. Respondent Jaynes has failed to show that the challenged anti-spam falsification statute would forbid *any* protected speech. Hence, that statute is not facially overbroad.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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COMMONWEALTH OF VIRGINIA,
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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When confronted with a claim that a statute is substantially overbroad and, thus, facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications?

2. Does a statute which prohibits falsifying the headers identifying the sending server of an e-mail, but which does *not* require public identification of the author of its content, prohibit a substantial amount of protected speech?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to criminal justice in order to protect and advance the rights of victims of crime and the law-abiding public.

In some crimes, such as murder or rape, a single violation causes grievous loss. At the other end of the scale, there are crimes where each violation is minor, perhaps even trivial, but the cumulative effect of many

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

repetitions is serious damage to society. See James Q. Wilson, Introduction, in K. Scheidegger, A Guide to Regulating Panhandling 2 (CJLF 1993), available at http://www.cjlf.org/publctns/Panhandling/Pcvr_bio.htm.

Spam is an extreme example of the latter type. A single unwanted e-mail is a microscopic burden on the receiving server, and it is a trivial matter for the recipient to delete it. However, when a user's inbox is flooded with hundreds of spams a day, sorting through them to find the occasional valid and possibly important message becomes a time-consuming, productivity-destroying chore. Using an automated filter creates the danger that a "false positive" will erroneously block a valid message, see Federal Trade Commission, National Do Not Email Registry: A Report to Congress 11-12 (2004), seriously detracting from the reliability of e-mail.

Spamming thus detracts from the important advantages that e-mail has to offer. The crime in this case consists of an intentional evasion of the measures that e-mail customers and their service providers have taken to protect themselves from a tsunami of unwanted communications. Such evasion is and should be a crime, and the decision of the Virginia Supreme Court is therefore contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Jeremy Jaynes engaged in the practice of sending large volumes of advertisements by electronic mail. Such messages are commonly called "spam," a term derived from a Monty Python comedy skit in which that word is repeated a maddening number of times. See Templeton, Origin of the Term "Spam" to Mean Net Abuse, available at http://www.templetons.

com/brad/spamterm.html (as visited Dec. 29, 2008); see also AOL Video, Monty Python—Spam!, http://video.aol.com/video-detail/monty-python-spam/2731045573 (as visited Jan. 6, 2009). "Unsolicited commercial e-mail ('UCE' or 'spam') poses a serious threat to electronic communication over the Internet for consumers and businesses." Federal Trade Commission, National Do Not Email Registry: A Report to Congress 1 (2004) ("FTC Report").

Spam has been the subject of both federal and state legislation. See *id.*, at i (describing "CAN-SPAM Act"). This case involves a state statute which prohibits intentionally falsifying the header information that is used to identify the transmitting server of an e-mail. See Pet. for Cert. 3 (quoting statute); FTC Report, at 4-8 (describing function of e-mail headers).

The header information identifying the source of an e-mail is not required by any governmental enactment but rather by a technical standard, the Simple Mail Transfer Protocol (SMTP), established by private agreement and adhered to by the providers of Internet e-mail services. See App. to Pet. for Cert. 21-22, and n. 11; FTC Report, at 4. If the header information were accurate, it would be a simple matter to block unwanted spam by blocking transmission from known spammers or from sources transmitting unusual volumes of e-mail. See FTC Report, at 11. The purpose of falsifying header information is to defeat the efforts of recipients and their service providers to protect themselves from the deluge of unwanted junk mail. See FTC Report, at 8.

Defendant violated the Virginia statute by using various computers and false header information to make it appear that his e-mails were coming from many different sources. From his home in North Carolina, he sent over 50,000 e-mails to subscribers of America

Online (AOL), located in Virginia. App. to Pet. for Cert. 2. The information on AOL customers had been stolen by a former AOL employee and was found in a search of defendant's home. *Id.*, at 3. He was convicted on three counts and sentenced to three years in prison on each, to be served consecutively for a total of nine years. *Id.*, at 4-5.

On appeal, the Virginia Court of Appeals affirmed. Among other arguments, the appellate court rejected Jaynes's First Amendment challenge to the statute:

> "The VCCA proscribes no speech. Rather, the statute proscribes intentional falsity as a machination to make massive, uncompensated use of the private property of an ISP [Internet Service Provider]. Therefore, the statute cannot be overbroad because no protected speech whatsoever falls within its purview." App. to Pet. for Cert. 106 (footnote omitted).

The Virginia Supreme Court initially rejected the First Amendment argument on standing grounds. See App. to Pet. for Cert. 54-55, 63. On rehearing, that court decided that Jaynes did have standing to challenge the statute as applied to noncommerical speech even though his e-mails were commercial. App. to Pet. for Cert. 10-18. The court then found that the statute burdens "core political speech" by proscribing anonymous e-mails, see *id.*, at 23, and that it is substantially overbroad and therefore unconstitutional in its entirety. See *id.*, at 25-27.

The Commonwealth filed a timely petition for writ of certiorari in this Court.

SUMMARY OF ARGUMENT

The Commonwealth has asked the Court to review this case to correct the Virginia Supreme Court's incorrect method of comparing the statute's valid applications to the invalid ones. In addition, the state court's assessment of the invalid applications was seriously in error on an important point that requires clarification.

In comparing the statute at issue with statutes that compel disclosure, the state court gave insufficient attention to the distinction between speech mandated by the government, on one hand, and government prohibition of a false response to a disclosure demanded by a private party, on the other. *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.* drew this distinction with regard to the fundraiser's "cut" of charitable contributions. A grant of certiorari is needed in the present case to clarify whether that distinction applies to a demand for the identity of the source of a communication.

The state court's assessment of invalid applications of the statute was based on the false premise that this statute prohibits anonymous political or religious speech by e-mail. It does not. Identification of the transmitting server is not the same as identification of the sender of the e-mail. A person who wishes to send anonymous e-mail in reasonable quantities can easily do so by making an agreement with an internet service provider to keep his identity confidential.

The Virginia Court of Appeals got it right the first time. "[T]he statute cannot be overbroad because no protected speech whatsoever falls within its purview."

ARGUMENT

I. The distinction between government-compelled disclosure and government-forbidden misrepresentation requires clarification.

"[T]he 'intentional lie' is 'no essential part of any exposition of ideas.' " *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 612 (2003) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974)). The present case does not involve a government mandate to say something when the speaker would prefer to say nothing. Cf. *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). This is a case where the defendant elected to tell bald-faced lies in order to receive services from a private entity under false pretenses, and the government prohibits such fraud. The distinction is an important one, and it needs to be made more explicit.

Riley and *Telemarketing* both involved the division of contributions between the charity for which the contributions were solicited and the for-profit fundraiser doing the soliciting. In *Riley*, the government mandated disclosure of the fundraiser's slice of the pie. See 487 U. S., at 795. The Court held that this "content-based regulation is subject to exacting First Amendment scrutiny." *Id.*, at 798. In striking down this requirement, the Court noted that the prospective "donor is free to inquire," *id.*, at 799, and that the State can punish "making false statements." *Id.*, at 800.

Riley's suggested alternative is precisely the situation in *Telemarketing*. In that case, a recipient of a solicitation "asked what percentage of her contribution would be used for fundraising expenses; she 'was told 90% or more goes to the vets.' " 538 U. S., at 608. That

was a lie; only 15% went to the charity. See *id.*, at 607. *Riley* was "plainly distinguishable." *Id.*, at 619.

The distinction that was so plain between *Riley* and *Telemarketing* appears to have eluded the Virginia Supreme Court in the present case. Disclosure of the sender's domain and Internet Protocol (IP) address in this case, like disclosure of the fundraiser's percentage in *Riley*, is required by private parties as a condition of their cooperation, not by the government as a condition of speech. The Simple Mail Transfer Protocol (SMTP) "is the product of private collaboration and not established by a governmental entity." App. to Pet. for Cert. 22, n. 11.

When it comes to stating a fact within his knowledge, a speaker has three choices: (1) tell the truth; (2) say nothing; or (3) lie. *Riley* held that the government cannot rule out choice 2 for the fundraiser's percentage. *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 166-167 (2002), similarly held that the government cannot compel disclosure of the identity of the speaker. When a private party demands disclosure and effectively rules out choice 2, *Telemarketers* held that the government *can* forbid choice 3, the deliberate lie, for the fundraiser's percentage. This case presents the same question for the source of the message.

The question is an important one, given the great importance of electronic mail in modern life. *Amicus* CJLF will not belabor this point because we understand it will be covered by another *amicus*. It is sufficient to note that electronic mail has had a pervasive effect on the conduct of business, even in the most tradition-bound of professions. See, *e.g.*, Supreme Court Rule 25.8. The utility of this marvelous advance in technology is threatened by persons such as defendant Jaynes, who force e-mail users to install "spam filters" and risk

that a genuine, important e-mail will be erroneously flagged as "spam" and not reach its addressee. See *supra*, at 2.

II. The Virginia statute does not prohibit anonymous e-mail.

The state court's decision rests on a false premise. The Virginia Supreme Court held that the statute is substantially overbroad under the standard of *United States* v. *Williams*, 553 U. S. __, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008).

> "Applying that inquiry under *Williams* in this case is relatively straightforward as Code § 18.2-152.3:1 would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech. For example, were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute." App. to Pet. for Cert. 26-27.

This analysis is mistaken for two reasons. First, it conflates nondisclosure with affirmative misrepresentation, as discussed in Part I above. By using the obvious pseudonym "Publius," Hamilton, Madison, and Jay identified the essays as coming from one source without disclosing the source. If they had signed the essays "Patrick Henry," affirmatively misrepresenting the source, that would be closer to the present case.

Second, disclosure of the transmitting server of an e-mail is not necessarily disclosure of the author of the content of the e-mail. In traditional terms, knowing the identity of the publisher is not the same as knowing the identity of the author. Using the Federalist Papers again as an example, the essays were published in New York newspapers, and while "the identity of Publius

was a well-guarded secret," Rossiter, Introduction, in The Federalist Papers x (C. Rossiter ed. 1961), the identity of the publisher of a newspaper is common knowledge.

If the sender of an e-mail has a private domain, the owner of that domain is typically discoverable through the registrar, as the Virginia Supreme Court says. See App. to Pet. for Cert. 22.[2] However, transmission from one's own domain is not the only, or even the primary, way to send noncommercial e-mail. Most individuals do not send personal e-mail from their own domain. The "little people" the *Watchtower* Court was concerned about, see 536 U. S., at 163, typically have an account with a service provider who owns the domain. Service providers run the spectrum from huge operations with millions of subscribers, such as America Online, Inc. (AOL), to tiny operations, some run by a sole proprietor.

To send an e-mail anonymously requires nothing more than opening an account with a provider who agrees to keep the customer's identity confidential. For example, Alexander Hamilton may open an account with Small ISP, Inc., owner of the smallisp.net domain. The Federalist Papers then go out with the IP address for smallisp.net, and the sender is identified as publius@smallisp.net. The fact the Publius is Hamilton is kept confidential by Small ISP, Inc. Unlike the situation in *Watchtower*, 536 U. S., at 166, the identity of the speaker is not in any government file, and it is not open for inspection by the public. There is, of

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2. We say "typically" because some registrars are now offering private registration that protects the contact information from disclosure. See Network Solutions, Inc., Private Domain Registration, http://www.networksolutions.com/domain-name-registration/private.jsp (last visited Dec. 29, 2008).

course, a risk of disclosure by infidelity of the provider, theft of the information, or legal process such as a search warrant, but those risks also exist in more traditional forms of publication of anonymous works.

The reason why defendant Jaynes did not avail himself of this simple alternative is itself simple. He wanted to send so many e-mails as to make a nuisance of himself—the digital-age equivalent of the obnoxious sound truck. See *Kovacs* v. *Cooper*, 336 U. S. 77, 87-88 (1949) (plurality opinion). If Small ISP, Inc. allowed a user to do this, it would soon find all of its e-mails blocked by the major providers, much to the consternation of its other customers, and it would terminate the user's account. This is not censorship, but rather enabling the recipients of communications to decide what they want to receive. Laws to assist in such private choice are clearly constitutional. See, *e.g.*, *Watchtower*, 536 U. S., at 168 ("No Solicitation" signs); *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 738 (1970) (barring mail from a particular source).

In short, the government has not prohibited anonymous speech in the present case. Private parties, not the government, compel the speaker to disclose the source of the e-mail, and the government merely forbids a false representation. In addition, disclosure of the transmitting e-mail server and the sender's domain need not disclose the author's identity. The Virginia Supreme Court's premise that this law "would prohibit all bulk e-mail containing anonymous political, religious, or other expressive speech," App. to Pet. for Cert. 26, is simply false.

The statute at issue in this case has little, if any, invalid scope. See *supra*, at 4 (quoting Court of Appeals opinion). It is not substantially overbroad under the test established by this Court and summarized in

Williams, *supra*. The statute is clearly constitutional as applied in this case.

CONCLUSION

The petition for a writ of certiorari to the Virginia Supreme Court should be granted.

January, 2009

Respectfully submitted,

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Supreme Court, U.S.
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No. 08-765

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,
v.
JEREMY JAYNES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES INTERNET SERVICE PROVIDER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Virginia Supreme Court erred by invalidating an important criminal statute under the First Amendment overbreadth doctrine absent evidence that any potential unconstitutional applications of the statute are real and substantial in comparison to the statute's legitimate sweep.

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INTEREST OF *AMICUS CURIAE*

The United States Internet Service Provider Association ("US ISPA") is a trade association that serves as the Internet Service Provider ("ISP") community's representative in common policy and legal matters. US ISPA represents many of the country's largest ISPs.

US ISPA and its members have a vital interest in the proper resolution of this case. US ISPA's members receive billions of unsolicited bulk electronic messages (sometimes referred to as "spam") through their servers every day, and have invested significant resources to attempt to filter and block spam on behalf of their subscribers. Sending spam with deceptive transmission information designed to bypass ISPs' filters, including the criminal behavior at issue in this case, imposes direct and substantial injuries on US ISPA members. In addition, US ISPA and its members have actively worked with federal and state legislatures and law enforcement officers to protect the operation of the Internet while promoting interstate commerce. As a result of its members' ongoing efforts to combat spam, US ISPA has a unique understanding of the practical and legal considerations relevant to the interpretation of laws combating spam.[1]

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[1] Pursuant to Rule 37.6, US ISPA states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the US ISPA and its members made any monetary contribution to the preparation or submission of this brief. Both parties received timely notice of US ISPA's intent to file this brief, and both parties granted consent.

SUMMARY OF ARGUMENT

Respondent Jeremy Jaynes, one of the most notorious spammers, was convicted of sending tens of thousands of spam messages through privately-owned network facilities in Virginia. His spam e-mails peddled such products as a "penny stock picker," a FedEx refunds claim product, and an Internet history eraser product. During a search of his home, police found compact discs containing over 100 million e-mail addresses of AOL subscribers—a purchased copy of a stolen database of every AOL subscriber. He was convicted under a provision of the Virginia Computer Crimes Act ("VCCA") that makes it a crime to "use[] a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers." Va. Code Ann. § 18.2-152.3:1.

Respondent concedes that this statute is constitutional as applied to him, and that his unlawful conduct is a legitimate target of criminal prosecution. He argued below that his conviction should be reversed because the statute may be unconstitutional as applied to *others*—*i.e.*, that it is unconstitutionally overbroad. The Virginia Supreme Court agreed, holding that the language of the statute might reach hypothetical speakers who wish to engage in anonymous political or religious speech by sending bulk unsolicited e-mails, and concluding on that ground that the statute is unconstitutional.

The Virginia Supreme Court's ruling distorts the overbreadth doctrine, and reflects a more general

confusion among lower courts over how to apply the doctrine. The Virginia Supreme Court cited no evidence in the record that any anonymous political or religious speakers actually exist who attempt to broadcast their messages by sending tens of thousands of unsolicited bulk messages using forged routing or transmission information. As US ISPA explains below, the court could not cite any such evidence because its hypothetical scenarios have no grounding in reality. The Thomas Paines or Publiuses of the world have many ways to speak anonymously on the Internet and through e-mail, and even a cursory search of the Internet shows that such speakers are thriving online. In the real world, as US ISPA and its members are acutely aware, spammers—who send billions of unsolicited messages each day using forged header information to evade e-mail filters—are not spreading the messages of political dissidents or oppressed religious sects. Rather, they are abusing the Internet to peddle commercial products and defraud consumers, shifting the substantial costs and burdens associated with processing and transmitting such spam onto private network owners. The potentially unconstitutional applications of this statute are thus purely hypothetical, with no basis in actual fact, and cannot justify a holding that the statute is unenforceable in all contexts.

Had respondent been required to make a factual showing of substantial overbreadth (rather than merely positing fanciful hypotheticals), the Virginia Supreme Court would have seen that there is no basis to conclude that the VCCA has any meaningful impact on protected expression. Had the court compared the statute's legitimate sweep to any such tiny (or

nonexistent) restriction on protected speech, it would have affirmed respondent's conviction. Unfortunately, the court abdicated that responsibility, and invalidated an important statute based on far-fetched hypotheticals untethered to any factual record or legislative findings, or even any real world scenarios.

As US ISPA demonstrates below, spam is a serious problem that is properly and narrowly targeted by the VCCA. This Court should grant certiorari to reverse the erroneous invalidation of the Commonwealth's statute and provide the lower courts needed guidance on the proper application of the overbreadth doctrine.

ARGUMENT

I. SPAM IMPOSES MASSIVE COSTS AND IS A LEGITIMATE TARGET OF CRIMINAL PROSECUTION

A. Spam Causes Significant Injury to the Private Networks of Internet Service Providers

Nearly everyone with an e-mail account sends, receives, and accesses e-mail through a third-party service provider, whether that provider is their employer, or, more commonly, a private electronic mail service provider ("ISP").[2] Sending an e-mail therefore involves more parties than merely the sender and receiver. Such e-mails must be filtered, processed, routed, and stored by the recipient's ISP on the ISP's servers and internal network. ISPs have made substantial investments in their infrastructure to

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[2] Electronic mail service is one service typically provided by an Internet Service Provider. For convenience, we refer to electronic mail service providers by the more commonly-used acronym "ISP."

handle the billions of e-mails sent, received, and stored each day.

Because sending e-mail to an ISP's subscriber imposes costs and burdens on the ISP's facilities and resources, every ISP of which US ISPA and its members are aware prohibits the sending of unsolicited bulk e-mail through their facilities. Despite those clear prohibitions, spammers nonetheless send billions of such messages each day through ISPs' private networks. The record in this case shows that AOL's mail servers alone received over 1 billion e-mails every day; that at least 70 to 80 percent of those e-mails were spam; and that AOL received 7 to 10 million complaints per day from customers about spam. *See* Pet. App. 102. Congress found that, in 2003, more than 2 trillion spam e-mails were estimated to be sent over the Internet, two-thirds of which would contain fraudulent content.[3] The Federal Trade Commission has stated that spam is being used increasingly as a vehicle for "phishing," (which refers to sending a fraudulent e-mail masquerading as from a trustworthy source in order to acquire sensitive information such as bank account numbers or social security numbers).[4] Spam is also used increasingly for inducing people to download harmful viruses or other malicious software.[5]

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[3] S. Rep. No. 108-102, at 3, 2 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2349.

[4] Federal Trade Commission, National Do Not Email Registry: A Report to Congress 16 & n.76 (June 2004), *available at* http://www.ftc.gov/reports/dneregistry/report.pdf ("FTC Report").

[5] FTC Report at 1, 10, 24.

ISPs' mail servers and spam filters have finite processing speed and memory storage capacity, and the massive volume of spam e-mails destabilized their networks by reducing system reliability and efficiency. One court aptly summarized this problem: "High volumes of junk e-mail devour computer processing and storage capacity, slow down data transfer between computers over the Internet by congesting the electronic paths through with the messages travel, and cause recipients to spend time and money wading through messages that they do not want." *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1028 (S.D. Ohio 1997). The spam nuisance also damages the ISP's goodwill and the value of its reputation and brand. Spam costs ISPs billions of dollars a year due to the burdens spam imposes on their networks, the costs of filtering and preventing spam from reaching subscribers, and the lost goodwill and confidence due to consumers' frustrations.[6]

Indeed, Congress has recognized the severity of the problem and enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM Act"), to help address the spam problem. After years of hearings and extended debate concerning the spam problem, Congress made several findings: (1) spam imposes costs on individuals who must access, review, and discard unwanted spam; (2) spam decreases the convenience and utility of e-mail; (3) spam creates a risk that desired e-mails will be lost amid a torrent of

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[6] In a recent case, a court found that one spammer alone inflicted millions of dollars in direct damages by flooding an ISP with spam. *See EarthLink, Inc. v. Carmack*, No. 1:02-CV-3041-TWT, 2003 U.S. Dist. LEXIS 9963, at *17 (N.D. Ga. May 7, 2003).

unwanted spam; and (4) spam imposes significant costs on ISPs, businesses, and schools, which must spend more money to acquire the infrastructure necessary to handle the increased e-mail traffic. S. Rep. No. 108-102, at 5-7, *as reprinted in* 2004 U.S.C.C.A.N. at 2352-53. Congress believed that "spam may soon undermine the usefulness and efficiency of e-mail as a communications tool." *Id.* at 6, *as reprinted in* 2004 U.S.C.C.A.N. at 2352. Congress in 2003 estimated that spam costs Internet subscribers $9.4 billion per year and would likely cost corporations over $113 billion by 2007. Employee productivity losses alone from sifting through and deleting spam accounted for nearly $4 billion in 2003. *Id.* at 6-7, *as reprinted in* 2004 U.S.C.C.A.N. at 2353. Congress recognized the need for a variety of laws to address this large problem, and specifically excepted from preemption state laws, like the VCCA, that seek to curb fraudulent and criminal spam. 15 U.S.C. § 7707(b)(2).

Since Congress made its fact findings in 2003, the volume of spam messages sent has not declined. A recent report found that approximately 85% of all attempted e-mails are "abusive" spam.[7] Another study found that worldwide spam levels averaged 84.6% of

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[7] Messaging Anti-Abuse Working Group ("MAAWG"), Email Metrics Report: The Network Operators' Perspective, Report #9 – Second Quarter 2008 2 (Oct. 2008), *available at* http://www.maawg.org/about/MAAWG_2008-Q2_Metrics_Report9.pdf; MAAWG, Email Metrics Report: The Network Operators' Perspective, Report #1 – 4th Quarter 2005 Report 2 (Mar. 2006), *available at* http://www.maawg.org/about/MAAWG_2005-4Q-Metrics_Report.pdf.

the total number of e-mails for 2007.[8] Approximately 80% of that spam is distributed through networks of compromised personal computers under the control of cyber criminals, commonly known as botnets.[9] Additionally, the instances of web-based attacks by malicious software, of which spam is a leading source, continued to rise over the last several years.[10]

B. ISPs Make Every Effort To Keep Spammers Off Of Their Private Networks

Network owners attempt to protect their private property from the abuse inflicted by spam by deploying technical filtering software to identify and block as much spam as possible from reaching the mailboxes of their subscribers. ISPs do not employ spam filters out of some abstract opposition to anonymous speech; they employ spam filters because their customers overwhelmingly demand it and because the physical limitations on the size of their networks require it. ISPs' anti-spam measures involve highly sophisticated technological filters that, among other things, identify computers that previously sent spam and then block messages sent by those computers from reaching

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[8] *See* International Telecommunications Union, ITU Study on the Financial Aspects of Network Security: Malware and Spam 22, 27 (July 2008), *available at* http://www.itu.int/ITU-D/cyb/cybersecurity/docs/itu-study-financial-aspects-of-malware-and-spam.pdf ("ITU Study").

[9] *Id.* Computer hackers create botnets by transmitting malicious codes (most often through spam) to thousands of personal computers. Once downloaded, the code infects the computer so that it acts essentially as a robot drone for the hacker controlling the botnet.

[10] ITU Study. at 20-22.

subscriber mailboxes. These anti-spam measures are expensive to develop and maintain, and require significant technical and personnel resources. AOL, for example, employs a staff of 30 people dedicated solely to its spam response team.

Spammers resort to elaborate methods to elude ISPs' spam filters and surreptitiously gain access to private networks that would otherwise bar them. One of the most common ways spammers seek to evade the filters is by forging their messages' routing or transmission information so that tens of thousands of messages sent from a single sender appear to originate from many sources. Spammers thus deliberately disguise the source of their spam by masking the computer from which the e-mail is sent in order to send billions of messages through ISPs who are making every effort to bar them by identifying and blocking their source.

Spammers who evade these anti-spam filters effectively shift the costs of distributing their messages onto ISPs. Instead of using alternative means of distributing their messages, for which they might otherwise pay postage, delivery fees, or advertising space, spammers force ISPs to shoulder the burden of transmission, processing, and storing those messages. *See State v. Heckel*, 24 P.3d 404, 410 (Wash.) ("This cost-shifting—from deceptive spammers to businesses and e-mail users—has been likened to sending junk mail with postage due ...."), *cert. denied*, 534 U.S. 997 (2001). The economic reality is that spam has grown exponentially because, from the spammer's perspective, it is virtually free to send. Every other method a marketer could use to sell his products, from

direct mail to television advertising to renting a billboard, costs money.

C. Federal And State Laws Properly Create Civil And Criminal Penalties For Spamming

State and federal laws against spam are important to protect ISPs and their customers. Indeed, Congress and 43 states, including Virginia, have enacted anti-spam laws in order to impose civil and criminal deterrents to spamming. The types of anti-spam provisions exemplified by the statute at issue in this case are vital to protect the property and security of ISPs and their subscribers from spammers and from any malicious software or other harmful applications their spam may contain.

ISPs, legislators, and law enforcement have been working together to combat the spam problem. Technical filters alone are inadequate to prevent spam as evidenced by the millions of spam complaints that AOL alone receives daily. Legislation such as the VCCA is also a necessary tool in the battle. The VCCA provides valuable deterrence in the form of criminal sanctions for those who attempt to evade private network owners' technical defenses in order to send spam. This Court should be reluctant to condone a ruling that invalidated a reasoned legislative attempt to grapple with this serious problem.

II. LOWER COURTS ARE CONFUSED OVER HOW TO APPLY THE OVERBREADTH DOCTRINE

VCCA § 18.2-152.3:1 is a content-neutral statute that does not generally prohibit anonymous speech on the Internet or through e-mail. The statute does not apply when a person sends e-mails using a

pseudonymous e-mail address (*e.g.*, redsoxfan@isp.com); it does not apply when a person erects and hosts an anonymous web page; it does not apply when a person anonymously posts on a blog or Internet bulletin board; it does not apply when a person uses an alias in a chat room; and it does not apply to the myriad ways that a person can speak anonymously in the tangible world.

The statute only applies when a defendant (1) infiltrates a "computer network of an electronic mail service provider or its subscribers," by (2) transmitting "unsolicited bulk electronic mail," (3) "with the intent to falsify or forge electronic mail transmission information or other routing information." The statute targets the invasion of private property—the "computer network of an electronic mail service provider or its subscribers"—and the technical falsification used to achieve that invasion.

Respondent has never contested that the VCCA is constitutional as applied to his conduct. The Virginia Supreme Court nevertheless reversed his conviction and held that the VCCA was unconstitutional on the basis of hypothetical applications of the statute not before the court. The Virginia Supreme Court did not point to any record evidence consistent with its hypothetical concerns and it pointed to no actual instances of the types of speech it worried might be impaired by the statute.

This case is the paradigmatic example of why this Court must clarify the overbreadth doctrine. The lower courts are in disarray over how to apply the overbreadth doctrine, culminating in the Virginia Supreme Court's decision to invalidate an important statute that is "surely valid 'in the vast majority of its

intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted).

A. The Overbreadth Doctrine Is "Strong Medicine" And Is Necessarily Narrow And Limited

The overbreadth doctrine is an exception to this Court's normal rules regarding facial challenges. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). Out of concern that some overly broad statutes may "chill" constitutionally protected speech, the overbreadth doctrine provides that "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law." *Id.* at 118-19 (citations omitted).

This Court has repeatedly held that such a challenge to a statute "is, manifestly, strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). For that reason, the overbreadth doctrine "has been employed by the Court sparingly and only as a last resort." *Id.*; *see also N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 11 (1988) (noting that the overbreadth doctrine is a "narrow" "exception to ordinary standing requirements"); *Hicks*, 539 U.S. at 119 (noting that "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct").

Therefore, in order to succeed in an overbreadth challenge, a defendant must demonstrate "*from actual fact* that a substantial number of instances exist in which the Law cannot be applied constitutionally." *N.Y. State Club Ass'n*, 487 U.S. at 14 (emphasis added). "[H]ypertechnical theories as to what a statute covers"

and "speculation about ... hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill*, 530 U.S. at 733 (citation omitted). Also, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984); *see also United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).

B. The Virginia Supreme Relied On Hypothetical Scenarios That Have No Basis in Actual Fact

To support its decision that VCCA § 18.2-152.3:1 is overbroad, the Virginia Supreme Court relied on two hypothetical scenarios: (1) the VCCA would have effectively prevented Publius from publishing the anonymous Federalist Papers had they been sent as an unsolicited bulk e-mail with forged IP address information today; and (2) the VCCA could possibly inhibit a Chinese dissident or other political dissident seeking to publicize his political views through spam. The Virginia Supreme Court divined these hypotheticals from respondent's attorneys' briefs, and from its own conjecture; no evidence in the record establishes that either scenario is realistic.

Certainly, protecting anonymous political and religious speech is vitally important, whether communicated through e-mail or any other means. However, as far as US ISPA and its members are aware, these simply are not categories of speech that are expressed by sending tens of thousands of unsolicited e-mails with forged headers designed to

evade spam filters and infiltrate private networks. US ISPA's members have vast experience in this area, and their experience confirms several realities about spam e-mail.

First, spam is overwhelmingly used to propose commercial transactions or fraudulent schemes, and to transmit malicious viruses and software. Spammers commonly seek a direct response from recipients, in the form of a sale or some other end user response, even if the spammer is shielding his identity. Spammers thus are anonymous strictly as a means to facilitate their moneymaking efforts or to evade civil or criminal prosecution for fraud, trespass, or myriad other torts and crimes. This Court's cases protecting anonymous speech, by contrast, have focused on the value a pseudonym *adds* to the quality of speech. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995) (noting, for example, that anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent," and that anonymity protects "the hard-won right to vote one's conscience without fear of retaliation").

Second, those who wish to communicate religious and political messages overwhelmingly use other means, such as anonymous web pages or blogs, or even pseudonymous free e-mail accounts. US ISPA's members are not aware of spammers who are sending unsolicited bulk e-mails with falsified routing and transmission information to communicate political and religious messages in any meaningful numbers. There are no facts in the record to show that such political or religious spam even exists, and any such spam is at

most trivially small in comparison to commercial or malicious spam.[11]

Third, US ISPA is not aware of any major ISP that actually welcomes spam. To the contrary, every ISP of which US ISPA is aware not only expressly prohibits the sending of spam through its network, but takes active measures to filter and block spam messages. Spammers are sending their messages through and into private networks that affirmatively prohibit their conduct.

Finally, to unmask a spammer requires an ISP to invest substantial time, resources, and money. The notion that ISPs are interested in referring insignificant (indeed, heretofore nonexistent) volumes of political or religious speech to law enforcement—as opposed to the billions of commercial spam messages that flood their private networks every day—is farfetched. There is certainly no meaningful likelihood that any religious or political spam would ever be prosecuted under the Virginia provision in question.

It bears emphasis that the conduct for which respondent was convicted bears no connection to any of the forms of anonymous speech that are prevalent on the Internet or e-mail. Respondent was not convicted for sending e-mails using a pseudonymous e-mail

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[11] The Virginia Supreme Court also erred by failing to recognize that Publius's ability to anonymously publish the Federalist Papers was still constrained by trespass laws. Publius could not have forced pamphlets on unwilling recipients on their own private property. The VCCA only applies to e-mails sent using private computer networks, and neither Publius nor respondent is privileged to appropriate AOL's network, or the Washington Post's advertising pages, or a privately-owned billboard, to transmit messages, regardless of content.

address; such conduct does not trigger VCCA § 18.2-152.3:1. Rather, respondent was convicted for using dozens of falsely registered domain names in order to send over 50,000 e-mails to AOL subscribers that fraudulently appeared to come from dozens of different sources in order to evade AOL's spam filters. Falsely registering domain names with affirmative misrepresentations is entirely different from the myriad ways in which people can, and do, lawfully anonymize their identities on the Internet and with e-mail.

Of course, if there are spammers who wish to transmit political or religious speech using falsified transmission information, and those spammers are unconstitutionally subject to the statute's prohibitions, they need only bring an as-applied challenge. *See Williams*, 128 S. Ct. at 1838. Such a challenge would, inevitably, produce a factual record on which to judge *actual* applications of the law to *actual* examples of protected speech. But the lesson from this Court's cases is that the overbreadth doctrine is not to be used to invalidate a statute absent actual substantial overbreadth judged in comparison to a statute's legitimate sweep.

Because actual religious or political spam is either nonexistent or trivial, the Virginia Supreme Court would have had to affirm respondent's conviction if the court had weighed any unconstitutional applications of the statute that had some basis in fact against the statute's legitimate sweep.

C. Lower Courts Are In Disarray Over How To Apply The Overbreadth Doctrine

At a conceptual level, this Court's legal standard for evaluating a claim of overbreadth is clear. This Court has repeatedly held that a statute is facially invalid only if it prohibits a *substantial* amount of protected speech. *Williams*, 128 S. Ct. at 1838 (citing cases). Courts must judge overbreadth "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* A challenger bears the burden to "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." *N.Y. State Club Ass'n*, 487 U.S. at 14.

The lower courts have struggled, however, with how to apply this standard. In particular, they have disagreed over how to determine if a statute will affect many or few instances of such speech and whether a court may simply hypothesize the extent of any unconstitutional application or instead must base any such findings on a concrete factual record. Here, the Virginia Supreme Court struck down the VCCA because it might hypothetically apply to religious sects who wish to send tens of thousands of e-mail messages to unwilling recipients with falsified transmission information, without even pausing to ask whether that theoretical overbreadth is "substantial" in any meaningful sense. It made no findings that such hypothetical speakers actually exist or in what numbers, and never considered if they would have alternative forms of communication available to them. Had this case arisen in one of a number of other jurisdictions, the statute would have upheld for the

complete absence of any evidence of an effect on actual protected noncommercial speech.

The petition identifies a number of courts, like the Virginia Supreme Court below, that have not hesitated to invent or presume facts regarding the substantiality of any overbreadth. For example, the Eighth Circuit recently invalidated a provision of a federal bankruptcy statute by hypothesizing a few potential unconstitutional applications, and then concluding that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 794 (8th Cir. 2008); *see also State v. Casey*, 876 P.2d 138, 140-141 (Idaho 1994) (invalidating statute based on single hypothetical application). By contrast, the petition identifies other courts that apply much more rigorous mechanisms and decline to hold a statute facially invalid unless there is evidence that any overbreadth is substantial *as a matter of actual fact* in comparison to the statute's legitimate sweep.

Everything turns on that distinction. The scope and impact of the overbreadth doctrine depend entirely on how courts *apply* this Court's standard. A jurisdiction in which judges make findings about whether hypothetical applications of a statute are likely or unlikely has a very different (and far less constrained) overbreadth doctrine than a jurisdiction that requires challengers to demonstrate substantial overbreadth in actual fact. On that point the lower courts are in dire need of guidance.

Undoubtedly, some examples of protected speech may be so obvious or common that a court does not need to point to empirical evidence to invalidate a statute. No one would argue that a challenger needs

statistical studies to persuade a court that a statute prohibiting all speech in public parks is substantially overbroad. But in many (perhaps most) instances, how a statute's legitimate sweep compares to any potentially unconstitutional application will be non-obvious and fact-specific. In such instances the question of the degree to which a court may rely on its own instincts divorced from any factual record may be dispositive. As this case demonstrates, challengers should bear some burden to establish that any potential overbreadth is real, and actually substantial in comparison to the statute's legitimate sweep.

This case presents the issue squarely, as the Virginia Supreme Court's decision invalidated an important state statute targeting serious criminal conduct based on a purely hypothetical concern with overbreadth. That cannot be what this Court had in mind.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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